Supreme Court, U.S.
FILED

(1)

96 471 SEP 24 1996

No. 96-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CLARENCE E. MILLER, *et al.*,

Appellants,

v.

STATE OF OHIO, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division

JURISDICTIONAL STATEMENT

DAVID V. STIVISON
Counsel of Record
870 North 30th Street
Philadelphia, PA 19130
(215) 763-2809

Counsel for Appellants

Of Counsel:

JOHN B. ANDERSON
Distinguished Visiting
Professor of Law
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale FL 33314
(305) 452-6100

JOHN R. GREIBER, JR.
COUNCIL, BARADEL, KOSMERL & NOLAN,
P.A.
125 West Street, Fourth Floor
P. O. Box 2289
Annapolis, MD 21404-2289
(410) 268-6600

228 PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Does the principle of governmental neutrality arising from the guarantees of equal protection and due process of law established by the Fourteenth Amendment to the United States Constitution, and the rights of free speech, free association and petition protected by the First Amendment to the United States Constitution, or a combination thereof, require that a state promulgate an impartial procedure to establish the boundaries of districts used to elect members of the United States House of Representatives?

2. Do Article I, Section 2 and Section 4, and the First and Fourteenth Amendments to the United States Constitution, prohibit attempts by a state to assure election of some candidates for Congress and defeat of others by the manipulation of Congressional district boundaries?

3. Do Article I, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution require that a state introduce evidence to justify any deviation in population, no matter how small, among districts used to elect members of the United States House of Representatives when alternative plans were available that would have produced districts having exactly equal populations?

THE PARTIES

Appellants are former Congressman Clarence E. Miller; former Congressional candidates Thomas V. Erney, Robert J. Fitrakis, Steve Grote, Donald H. Hollister, Salvatore Pansino, and Robert L. Woodall, who had all challenged incumbents; independent voter Diana D. Kukor; and The Libertarian Party of Ohio.

Appellees, as designated in the Complaint, are the State of Ohio, Robert Taft II in his official capacity as Secretary of State, George V. Voinovich in his official capacity as Governor of the State of Ohio, Stanley J. Aronoff in his official capacity as President of the Ohio Senate, Vernal G. Riffe, Jr., in his official capacity as Speaker of the Ohio House of Representatives, Eugene J. Watts in his official capacity as chairman of the reference and oversight committee of the Ohio Senate, William J. Healy in his official capacity as chairman of the State Government Committee of the Ohio House of Representatives, and the following persons in their official capacity as members of the joint House/Senate conference committee responsible for developing Ohio's 1992 Congressional redistricting plan, Am. Sub. S. B. 292: Richard H. Finan, Robert J. Boggs, Barry Levey, Betty Montgomery, Alan J. Zaleski, William L. Mallory, Corwin M. Nixon, Judy B. Sheerer, Michael P. Stinziano, and Robert L. Corbin.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

OPINION BELOW 2

JURISDICTION 2

STATUTES INVOLVED 4

STATEMENT OF THE CASE 6

THE QUESTIONS ARE SUBSTANTIAL 8

I. Does the principle of governmental neutrality arising from the guarantees of equal protection and due process of law established by the Fourteenth Amendment to the United States Constitution, and the rights of free speech, free association and petition protected by the First Amendment to the United States Constitution, or a combination thereof, require that a state promulgate an impartial procedure to establish the boundaries of districts used to elect members of the United States House of

Representatives? 8

II. Do Article I, Section 2 and Section 4, and the First and Fourteenth Amendments to the United States Constitution, prohibit attempts by a state legislature to assure election of some candidates for Congress and defeat of others by the manipulation of Congressional district boundaries? 13

III. Do Article I, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution require that a state introduce evidence to justify any deviation in population, no matter how small, among districts used to elect members of the United States House of Representatives when alternative plans were available that would have produced districts having exactly equal populations? 23

CONCLUSION 29

APPENDIX, Part A: Opinion and Order Below A-1

APPENDIX, Part B: Notice of Appeal A-15

APPENDIX, Part C: Complaint A-19

APPENDIX, Part D: Plaintiffs' Answer to Defendants' Motion to Dismiss Complaint pursuant to Fed. R. Civ. P. 12(b)(6) A-71

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983) 11, 12, 19

Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F.Supp. 394 (D.Md. 1991), aff'd. without op., 504 U.S. 938 (1992) 3

Arizonans for Fair Representation v. Symington, 828 F.Supp. 684 (D.Ariz. 1992), aff'd. sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation, 506 U.S. 981 (1992) 28

Badham v. Eu, 694 F.Supp. 664 (N.D.Cal. 1988), aff'd. 488 U.S. 1024 (1989) 19

Baker v. Carr, 369 U.S. 186 (1962) 12

Barron v. Baltimore, 32 U.S. 247 (1833) 15

Bullock v. Carter, 405 U.S. 134 (1972) 11

Bush v. Vera, ___ U.S. ___, 116 S.Ct. 1941 (1996) 23

Carrington v. Rash, 380 U.S. 89 (1965) 10

Chisholm v. Georgia, 2 Dallas (U.S.) 471 (1793) 14

Conley v. Gibson, 355 U.S. 41 (1957) 26

Davis v. Bandemer, 478 U.S. 109 (1986) 18-19

Epperson v. Arkansas, 393 U.S. 97 (1968) 9

Ex Parte Yarborough, 110 U.S. 651 (1884) 16

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 12

Fowler v. Rhode Island, 345 U.S. 67 (1953) 9

Gaffney v. Cummings, 412 U.S. 735 (1973) 19, 21

Gitlow v. New York, 268 U.S. 652 (1925) 5

Good v. Austin, 800 F.Supp. 551
(E.&W.D.Mich. 1992) 27

Good v. Austin, 800 F.Supp. 557
(E.&W.D.Mich. 1992) 27

Greenberg v. Bolger, 497 F.Supp. 756 (E.D.N.Y. 1980) 11

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966) 11

Hunter v. Erickson, 393 U.S. 385 (1969) 12

Karcher v. Daggett, 462 U.S. 725 (1983) 11-12, 25-29

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 18, 21, 24, 26, 28

Klahr v. Williams, 313 F.Supp. 148 (D.Ariz. 1970) 27

League of Nebraska Municipalities v. Marsh, 242 F.Supp. 357 (D.C.Neb. 1965) 27

Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993) 6

M'Culloch v. Maryland, 17 U.S. 403 (1819) 14

NAACP v. Button, 371 U.S. 415 (1963) 9

Niemotko v. Maryland, 340 U.S. 268 (1951) 9

Newman v. Voinovich, 789 F.Supp. 1410 (S.D.Ohio 1992), aff'd. 986 F.2d 159 (6th Cir. 1993) 6

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 8

Police Department v. Mosely, 408 U.S. 92 (1972) 8-9

Pope v. Blue, 809 F.Supp. 392 (W.D.N.C. 1992), aff'd. 506 U.S. 801 (1992) 20, 23

Reynolds v. Sims, 377 U.S. 533 (1964) 19

Romer v. Evans, ___ U.S. ___, 116 S.Ct. 1620 (1996) 10, 12

Rosen v. Brown, 970 F.2d 169 (1992) 19

Shaw v. Hunt, ___ U.S. ___, 116 S.Ct. 1894 (1996) 23

Scheuer v. Rhodes, 416 U.S. 232 (1974) 28

Stone v. Hechler, 782 F.Supp. 1116 (N.D.W.Va. 1992) 25, 26

Storer v. Brown, 415 U.S. 724 (1974) 12

Swafford v. Templeton, 185 U.S. 487 (1902) 16

United States v. Cathcart, 1 Bond 556, 25 Fed. Cas. 344, Case No. 14,756 (S.D.Ohio 1864) 15

United States v. Classic, 313 U.S. 299 (1941) 13

U. S. Term Limits, Inc. v. Thornton, ___ U.S. ___, 115 S.Ct. 1842 (1995) 13, 14, 16, 17, 18, 20, 22

Voinovich v. Quilter, 507 U.S. ___, 113 S.Ct. 1149 (1993) 28

Wells v. Rockefeller, 394 U.S. 542 (1969) 21

Wesberry v. Sanders, 376 U.S. 1 (1964) 19, 23-24, 28

West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) 9

White v. Weiser, 412 U.S. 783 (1973) 21

Widmar v. Vincent, 454 U.S. 263 (1981) 9

Williams v. Rhodes, 393 U.S. 23 (1968) 10, 19

Federal Constitution and Statutes

U. S. Const., Preamble 14

U. S. Const., Art. I, Sec. 2, Cl. 1 4-5, 12, 13, 23, 24

U. S. Const., Art. I, Sec. 4. Cl. 1 5, 13, 17

U. S. Const., Art. I, Sec. 6 17

U. S. Const., First Amendment 5, 8, 9

U. S. Const., Fourteenth Amendment 5-6, 8, 23

28 U.S.C. Section 1253 4

28 U.S.C. Section 1343(3) 2

28 U.S.C. Section 1343(4) 2

28 U.S.C. Section 1357 2

28 U.S.C. Section 1391(b) 2

28 U.S.C. Section 2284(a) 2

Federal Rules of Court

U. S. Sup. Ct. Rule 18.1 1

U. S. Sup. Ct. Rule 18.3 1

U. S. Sup. Ct. Rule 33 1

Fed. R. Civ. P. 12(b)(6) 1, 6, 26, 28

Other Authorities

The Constitution of the United States of America, House Document No. 190 (89th Congress, 1st Session), GPO 4

Decision in Philadelphia, C. Collier & J. L. Collier, Random House, 1986 16

The Federalist Papers, C. Rossiter, ed., Mentor, 1961 15-16

The Four Cornerstones of Democracy, David V. Stivison, XX Virginia Bar Assoc. Journal No. 4, pp. 15-16, Fall 1994 11

The Gerrymander: Origin, Conception, and Re-emergence, Leroy C. Hardy, Rose Institute of State and Local Government, Rosemont, Ca., 1990 18

The Illegitimacy of the Incumbent Gerrymander, 74 Texas L. Rev. 913 (1996) 27

Records of the Federal Convention of 1787, M. Farrand, ed., 1974 15, 16, 17

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CLARENCE E. MILLER, et al.,
Appellants,
vs.
THE STATE OF OHIO, et al.,
Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF OHIO, EASTERN DIVISION

JURISDICTIONAL STATEMENT

In Compliance with Rule 18.1, 18.3 and 33 of this Court, Appellants submit this statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the final judgment and decision of the United States District Court for the Southern District of Ohio, Eastern Division, sitting as a three-judge court, entered May 29, 1996, which granted the motion of the Appellees to dismiss Appellants' Complaint with prejudice for failure to state a cause of action, Fed. R. Civ. P. 12(b)(6).

OPINION BELOW

The order and opinion below, issued May 29, 1996, is set forth in the Appendix, Part A (A., 1-14).

JURISDICTION

This case comes before this Honorable Court on appeal from the decision of the District Court dismissing Appellants' Complaint with prejudice. On November 18, 1994, Appellants filed their Complaint, asking:

> That the Court mandate the Ohio legislature within a specified period of time to promulgate an impartial procedure to select and adopt a redistricting plan that will be consistent with all Constitutional requirements.[1]

Appellants stated that:

> **The purpose of this Complaint is to take the State of Ohio out of the business of rigging elections.**[2]

Appellees moved to dismiss this Complaint, asserting that a collusive bipartisan gerrymander of Ohio's

---

[1] Appendix, Part C (App., A-58). Jurisdiction is based on 28 U.S.C. Sections 1343(3) and 1343(4) and Section 1357. Venue in the Southern District of Ohio is proper under 28 U.S.C. Section 1391(b). A three-judge court was impaneled pursuant to 28 U.S.C. Section 2284(a).

[2] App., A-28 (emphasis added).

Congressional Districts does not violate the Constitution; arguing that single-digit population deviations among districts do not require justification; and raising contested factual issues related to Appellants' proposed remedies[3].

Appellants answered that Motion.[4] Appellees filed a Reply to this Answer. Oral argument was held August 29, 1995.

By Order dated May 29, 1996, the District Court granted the Appellees' motion to dismiss, holding first that:

> [W]hen, across nineteen congressional districts, the variation in size between the largest and smallest districts is just nine persons, there is no viable claim of a violation of Article I, [Section] 2.[5]

The Court stated it was not bound by the contrary reasoning in **Anne Arundel County**[6], which required state justification for every variance from exact equality.

---

[3] Memorandum in Support of Defendants' Motion to Dismiss, pp. 7, 19 and 28.

[4] App., A-71 through A-194.

[5] App., A-8.

[6] Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F.Supp. 394 (D.Md. 1991)(maximum deviation of ten people requires justification by state), aff'd. without op., 504 U.S. 938 (1992), discussed in Order at App., A-9. This produces the anomalous state of law in America that variations of ten voters must be justified (Anne Arundel) while nine do not (Miller).

Second, the Court declined to read Article I, Section 2, to limit the state legislature to a purely administrative role, rejecting Appellants' contention that the "founding fathers saw the State legislature as nothing more than administrators of these elections. Turn the lights on when you open the polls, turn them off when they close. It is a purely administrative function."[7]

Finally, again "[m]indful of our role as a trial court," the Court declined to apply the concept of governmental neutrality to a redistricting case in the absence of clear direction from this Honorable Court to do so[8].

Notice of Appeal from this Order was timely filed July 26, 1996[9] and this Jurisdictional Statement follows.

STATUTES INVOLVED

Article I, Section 2, Clause 1 of the Constitution of the United States[10] provides:

---

[7] Order, App., A-11, quoting from oral argument by Plaintiffs' counsel.

[8] Order, App., A-12.

[9] Appendix, Part B, App., A-15 through A-18. The right of direct appeal to this Honorable Court from the District Court's Order is conferred by 28 U.S.C. Section 1253.

[10] All quotations from the Constitution of the United States and its amendments are taken from The Constitution of the United States of America, House Document No. 190 (89th Congress, 1st Session), GPO 1965.

> The House of Representatives shall be composed of Members chosen every second Year **by the People of the several States**, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. (Emphasis added)

Article I, Section 4, Clause 1, further provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

The First Amendment to the U. S. Constitution[11] provides, in relevant part, that:

> Congress shall make no law .... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the U. S. Constitution, Section 1, provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

---

[11] The Fourteenth Amendment prohibits state governments from violating citizens' rights under the First Amendment. Gitlow v. New York, 268 U.S. 652 (1925).

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As a result of the 1990 U. S. Census, Ohio's Congressional delegation shrank from twenty-one to nineteen members, requiring redistricting[12].

The Speaker of the Ohio House of Representatives, a Democrat, and the President of the Ohio Senate, a Republican, acting for their respective parties, decided that one district formerly held by a Democrat and one district formerly held by a Republican would be eliminated in the new districting plan.

Eliminating the "Democratic" seat posed no problem because two Democratic incumbents had announced their retirement. Appellees, particularly Aronoff, Riffe and

---

[12] Complaint, App., A-30. Because the Complaint was dismissed under F. R. Civ. P. 12(b)(6), the lower Court's Order is subject to de novo review, all allegations in the Complaint are considered as true and must be liberally construed in the light most favorable to the Appellants. Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D.Ohio 1992), aff'd. 986 F.2d 159 (6th Cir. 1993); Mayer v. Mylod, 988 F.2d 635, 637-638 (6th Cir. 1993).

Sheerer, publicly stated that one Republican congressman would have to be singled out for elimination[13].

Congressman Clarence E. Miller, one of the two most senior Republican incumbents, was chosen. The final redistricting bill[14] split his district into four fragments with an incumbent in each of them. This presented him with a "checkmate gerrymander": Any move he made, or no move, required running against an entrenched incumbent. He was defeated in the 1992 primary.

Other boundaries were drawn with the specific intent to aid some candidates and harm others. All decisions were made by members of the Republican and Democratic leadership.

As a result of the decisions to aid eighteen incumbents and eliminate Mr. Miller, Ohio's Congressional districts did not contain equal populations. Seven of the nineteen exhibited variances from exact equality ranging from +2 to -7 persons, without the State articulating any consistently applied non-discriminatory legislative policy which dictated this result.[15]

Four plans submitted to committees of the Ohio legislature for consideration provided absolutely equal populations for all nineteen districts[16].

---

[13] Complaint, App., A-30 through A-33, A-37.

[14] Amended Substitute Senate Bill 292.

[15] Complaint, App., A-33. Seven districts deviated from the ideal of 570,900/570,901 population per district: #2 (+1); #7 (+1); #10 (+2); #12 (+1); #13 (-7); #15 (+1); #16 (+1).

[16] Complaint, App., A-32 - A-33.

For the reasons stated below, Appellants believe that this process and this result violate the United States Constitution and that they have a right to proceed to trial to prove their contentions.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Does the principle of governmental neutrality arising from the guarantees of equal protection and due process of law established by the Fourteenth Amendment to the United States Constitution, the rights of free speech, free association and petition protected by the First Amendment to the United States Constitution, or a combination thereof, require that a state promulgate an impartial procedure to establish the boundaries of districts used to elect members of the United States House of Representatives?

"The Equal Protection Clause . . . announces a fundamental principle: the State must govern impartially."[17]

The requirement of governmental neutrality has long been applied to speech, a core political right. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas,

---

[17] New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979).

its subject matter, or its content."[18]

Freedom of association, another core political right, also requires strict governmental neutrality:

> [T]he Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.[19]

It has long been settled that "The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion."[20]

Governmental neutrality is required by the Equal

---

[18] Police Department v. Mosely, 408 U.S. 92, 95 (1972). See also, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951) and Fowler v. Rhode Island, 345 U.S. 67 (1953). Mr. Justice Jackson crystallized this concept in these words: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943).

[19] NAACP v. Button, 371 U.S. 415, 444-445 (1963).

[20] Epperson v. Arkansas, 393 U.S. 97, 104 (1968), tracing this principle back to 1872. Accord, Widmar v. Vincent, 454 U.S. 263 (1981).

Protection Clause in all contexts in which that clause applies.[21]

Each of these points was recognized in the concurring opinion below[22]. The panel members, however, concluded that the principle of governmental neutrality "has not yet been recognized as a discrete constitutional right. Mindful of our role as the trial court, we decline to grant relief premised on an as yet undefined constitutional right."[23]

This was an error. The neutrality principle has been applied to political contests on numerous occasions. It secures the right of armed forces personnel to vote where they live[24]; the right of smaller political parties to have even-handed treatment[25]; the right of independent candidates to

---

[21] E.g., Romer v. Evans, ___ U.S. ___, 116 S.Ct. 1620 (1996).

[22] App., A-13 - A-14: "It is clear that such a neutrality principle has been narrowly defined in the context of specific constitutional claims, most notably the First Amendment's admonition that "Congress shall make no law respecting an establishment of religion," ...; the First Amendment's guarantee of freedom of speech ...; and the Fourteenth Amendment's guarantee of the equal protection of the laws ...". (Rice, J., concurring)

[23] App., A-12.

[24] Carrington v. Rash, 380 U.S. 89 (1965).

[25] Williams v. Rhodes, 393 U.S. 23 (1968).

be free of discriminatory filing deadlines[26]. Special postal rates limited to the Democratic and Republican parties have been invalidated[27]. The neutrality principle forbids states from favoring wealthy candidates or those with affluent backers[28]. Even a $1.50 poll tax has been struck down[29].

Simply stated, in religion, speech, assembly, petition, voting, access to the courts - the bedrock requirements of an ordered government[30] - the state cannot play favorites.

This also applies to drawing Congressional boundaries:

> When a State adopts rules ... defining electoral boundaries, those rules must serve the interests of the entire community. ... If they serve no purpose other than to favor one segment ... that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee

---

[26] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[27] Greenberg v. Bolger, 497 F.Supp. 756 (E.D.N.Y. 1980).

[28] Bullock v. Carter, 405 U.S. 134 (1972).

[29] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[30] See The Four Cornerstones of Democracy, David V. Stivison, XX Virginia Bar Assoc. Journal No. 4, pp. 15-16, Fall 1994.

of equal protection.[31]

This neutrality principle and Article I, Section 2, discussed below, each independently limit the State to adopting "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself,"[32] and are designed to make elections "fair and honest"[33]. Any provision that tilts the playing field for or against only some of the players violates this principle and is unconstitutional.[34]

Appellants now ask this Honorable Court to explicitly apply this principle to the drawing of Congressional district lines and to find that gerrymandering "reflects no policy, but simply arbitrary and capricious action."[35]

---

[31] Karcher v. Daggett, 462 U.S. 725, 748 (1983)(Stevens, J., concurring).

[32] Anderson v. Celebrezze, 460 U.S. 780, 788, n. 9 (1983)(emphasis added).

[33] Storer v. Brown, 415 U. S. 724, 730 (1974).

[34] Hunter v. Erickson, 393 U.S. 385 (1969)(only fair housing ordinances subject to referendum); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (campaign expenditure limits applicable only to banks); Romer v. Evans, ___ U.S. ___, 116 S.Ct. 1620 (1996)(politically penalizing only homosexuals).

[35] Baker v. Carr, 369 U.S. 186, 226 (1962).

II. Do Article I, Section 2 and Section 4, and the First and Fourteenth Amendments to the United States constitution, prohibit attempts by a state legislature to assure election of some candidates and defeat of others by the manipulation of Congressional district boundaries?

"[T]he right to choose representatives belongs not to the States, but to the people."[36] Article I, Section 2, is crystal clear in stating this right, which holds an almost unique place in our hierarchy of rights:

> [S]ince the Constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.[37]

Yet, despite this command, increasingly representatives are choosing their voters instead of voters choosing their representatives.

The requirement in Article I, Section 2, that representatives be directly chosen by the people was explained in U. S. Term Limits in these words:

> Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct

---

[36] U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1863 (1995).

[37] United States v. Classic, 313 U.S. 299, 315 (1941).

> power over the people, and chosen directly, not by States, but by the people. ... The Framers implemented this ideal most clearly in the provision, extant since the beginning of the Republic, that calls for the Members of the House of Representatives to be 'chosen every second Year by the People of the several states.'[38]

Direct election is a basic principle of natural law and inheres in the fundamental social contract underlying our democracy. Even the Preamble to the Constitution starts with a recognition of the truth that WE THE PEOPLE ordain and establish the Constitution and all the parts needed to make it work - not the states nor political parties but the People directly. The People established a Constitution to bind the state governments, not to have the states bind the Constitution[39]. The Constitution emanated from the People and was not the act of the sovereign and independent states[40]. It was ordained and established by the People of the United States for themselves and for their own

---

[38] Id. After quoting Chief Justice Marshall's observation that ours is "emphatically and truly, a government of the people," this Court turned to President Lincoln's pronouncement in the Gettysburg Address that ours is a "government of the people, by the people, for the people." Id., at 1863-1864.

[39] Chisholm v. Georgia, 2 Dallas (U.S.) 471 (1793).

[40] M'Culloch v. Maryland, 17 U.S. 403 (1819).

government, not for the government of the individual states[41] And this direct connection between the People and their government cannot be abrogated by anything a state may do - even including secession[42].

How to make direct election effective was one of the major topics of the Constitutional Convention.

Delegate Mason urged as early 31 May 1787 that the people directly elect the House members - and that they do it from separate Congressional districts[43].

Despite reservations by Mr. Gerry, who "did not like the election by the people", and Mr. Sherman, who wanted the people to have "as little to do as may be about the Government"[44], direct election of the House of Representatives was adopted[45]. As James Madison explained, it is "a clear principle of free government and ... [has] the additional advantage of securing better representatives, as well as of avoiding too great an agency of the state governments in the general one."[46] This provided

---

[41] Barron v. Baltimore, 32 U.S. 247 (1833).

[42] United States v. Cathcart 1 Bond 556, 25 Fed. Cas. 344, Case No. 14,756 (S.D.Ohio 1864).

[43] 1 Records of the Federal Convention of 1787, M. Farrand, ed., 1974, pp. 48-49.

[44] Ibid., p. 48.

[45] Ibid., pp. 50 (vote of May 31st); 130 (vote of June 6).

[46] 1 Records of the Federal Convention of 1787, supra, p. 134 (emphasis added). See also, The Federalist Papers, C.

for "an election by the people as to the 1st branch & by the States as to the 2nd. branch; by which means the Citizens of the States wd. be represented both **individually & collectively**."[47]

The right of a state to hold an election for Federal office arises originally and solely from the text of the Constitution[48]. It is an express delegation of power and an imposition of a duty which should be strictly construed to achieve the goal for which it was created[49]. To allow states such control over these elections that they can choose a specific candidate and target him for defeat, as was done to Mr. Miller, is an improper usurpation of control by a state over a federal function[50].

Rossiter, ed., Mentor, 1961, p. 326, No. 52 [James Madison] and Decision in Philadelphia, C. Collier & J. L. Collier, Random House, 1986, p. 112.

[47] Ibid., p. 136, Mr. Pierce (emphasis in original).

[48] Ex Parte Yarborough, 110 U.S. 651, 663-664 (1884); Swafford v. Templeton, 185 U.S. 487 (1902).

[49] U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1855-56 (1995)(delegation of power) (majority opinion); 1883 (imposition of duty)(dissenting opinion).

[50] In U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1855 (1995), this Court noted, "As Justice Story observed, each Member of Congress is 'an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states.'" The power to intentionally

To avoid such usurpations, the Convention voted that:

(1) Qualifications for federal voters would coincide with each state's qualifications for voters for that state's most numerous branch of its own legislature. This kept state's from adopting a "two-tiered" system, with only the rich or powerful choosing members of Congress.[51]

(2) Congress, not the state legislatures, would set the compensation for members of Congress[52]. States could not lower their salaries and freeze them out of office.

(3) States were not allowed to recall their own representatives once elected[53].

The Framers further provided that the state legislatures could set the "times, places and manner" of federal elections, but on this condition: "Congress may at any time by Law make or alter such Regulations, except as to the Places of

---

gerrymander a Member's district out of existence is a powerful instrument of control.

[51] The House "ought to be dependent on the people alone." The Federalist Papers, No. 52 [James Madison], ed. C. Rossiter, 1961, at 326. See discussion at U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. at 1857-1858 (1995).

[52] Article I, Section 6. For discussion, see 1 The Records of the Federal Convention of 1787, ed. M. Farrand, 1974, pp. 216, 372-373.

[53] 1 The Records of the Federal Convention of 1787, ed. M. Farrand, 1974, pp. 20, 217.

Chusing Senators."[54] No state or states could subvert Congress by simply refusing to elect members to it or by setting elections at midnight on New Year's Eve[55].

The Framers did their best to insulate Congressional elections from state legislative machinations. However, the growing role of organized political parties quickly acted to subvert that intent. Ohio gerrymanders[56] in 1878, 1884 and 1890 led to the defeat of Congressman (later President) William McKinley[57].

The Complaint in this case traces the results of Ohio gerrymanders for up to four decades. During that time only two political parties have dominated and, by acting in concert, they have had the same effect as if they were one monolithic organization. This is much more dangerous to democracy than a purely partisan gerrymander. Where two parties dominate but do not act in concert, a voter can almost always

---

[54] Article I, Section 4, Clause 1. See discussion at U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. at 1857-1858 (1995).

[55] See U. S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1883-1884 (1995) (dissenting opinion) for discussion.

[56] A gerrymander is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969)(Fortas, J., concurring).

[57] The Gerrymander: Origin, Conception, and Re-emergence, Leroy C. Hardy, Rose Institute of State and Local Government, Claremont, Ca. 1990, p. 29.

change allegiance and "Throw the rascals out!"[58]. When the Republican and Democratic leaders act as one, that choice is gone[59]. If the sixteen individuals named as defendants in this suit can accomplish an open intentional gerrymander, their power is multiplied many thousandfold over that of their ten million fellow Ohioans. Their votes on the redistricting plan are worth multiples of the votes of any other person cast in a Congressional election and their influence is far more lopsided than the voting inequities found in Reynolds v. Sims[60], Wesberry v. Sanders[61] or any other "one voter, one vote" case that has ever come before this or any Court.

Widespread bipartisan gerrymandering may help

---

[58] This Court has already indicated that where partisan gerrymandering is so deeply entrenched that there is no reasonable hope of challenging the party machine, it will step in. Davis v. Bandemer, 478 U.S. 109 (1986). This case is not a Bandemer case because it involves Congressional, not state districting; bipartisan, not one-party, gerrymandering; and because Miller involves individual rights while Bandemer involved group rights (as did Badham v. Eu, 694 F.Supp. 664 (N.D.Cal. 1988), aff'd. 488 U.S. 1024 (1989) and Gaffney v. Cummings, 412 U.S. 735 (1973)).

[59] These two parties have a long history of cooperation to maintain monopoly control over Ohio politics. See Williams v. Rhodes, 393 U.S. 23, 31 (1968); Anderson v. Celebrezze, 460 U.S. 780 (1983); Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992).

[60] 377 U.S. 533 (1964).

[61] 376 U.S. 1 (1964).

explain why ninety per cent of incumbents are consistently re-elected - even in the midst of "sweeping change" said to characterize the 1994 election.[62]

Gerrymandering has been business as usual for generations, but this Court's decisions ending poll taxes, literacy tests and excessive filing fees and enforcing "one voter, one vote" equality prove that even ancient evils can be cured.

The cure sought by Appellants is that the trial Court order the state to adopt an impartial districting procedure, without the discretion to gerrymander. It is important to note what the Appellants are not seeking: They are not asking the Court to replace the state's lines with a "better" map they have drawn. They are not asking the Court to draw the district lines itself. They are not asking to have a supposedly "independent" board make a subjective choice among plans, as implied in Pope v. Blue[63]. The Appellants are not even asking the Court to mandate that a particular impartial procedure be used.

At trial Appellants expect to present several expert witnesses who will describe some of the different systems they and others have developed over recent years to produce compact, contiguous, equi-populous districts cutting across the fewest local governmental boundaries. Appellants' experts

---

[62] U. S. Term Limits v. Thornton, 115 S.Ct. 1842, 1912 (1995) (dissenting opinion). Other advantages of incumbency are enumerated at pp. 1911-1912, id.

[63] 809 F.Supp. 392, 398 (W.D.N.C. 1992), aff'd. 506 U.S. 801 (1992), and as erroneously believed by the panel in this case, Tr., Oral Argument, Aug. 29, 1995, at pp. 37-39.

will also discuss the different ways of measuring which of several plans best meets these or other traditional districting criteria. One such procedure is described in the Appendix, A-125 through A-195. The end result of using any one of these methods will be to take personal discretion out of the process[64]. That is the only way to avoid merely replacing one gerrymander with another[65].

The state legislature should be free to make its own investigation and promulgate the method it prefers, as long as the method is impartial, it produces districts meeting Constitution's requirements, and its objectivity is independently verifiable (that is, anyone applying the same tests to the same plans will get the same results).

Lines drawn by an impartial method will still have

---

[64] It is no longer true that extirpating politics from the "essentially political processes of the sovereign states" is an impossible task. Gaffney v. Cummings, 412 U.S. 735, 754 (1973). Now it is possible to have a redistricting process that is "a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative government." White v. Weiser, 412 U.S. 783, 799 (1973)(Marshall, J., concurring in part).

[65] As Mr. Justice Harlan recognized, "The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of issues." Kirkpatrick v. Preisler, 394 U.S. 526, 551 (1969) (Harlan, J., joined by Stewart, J., dissenting) and Wells v. Rockefeller, 394 U.S. 542 (1969).

political impacts: Some candidates will be helped and others will be hurt. But they will know that such effects reflect purely "the luck of the draw" and not that some politico in Columbus has a personal vendetta to satisfy. Voters as well will know that the district lines were not chosen to accumulate a specific number of people with predetermined profiles to facilitate the election or defeat of a specific candidate or favor or disfavor a specific party. New parties will be assured they are competing on an even playing field, not one designed to prevent them from ever achieving representation. The goal of the Constitution - that every two years the People will freely elect representatives to stand in for them in guiding the Nation - will be one step closer to reality.

If "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government,"[66] that principle is violated as much when voters are assigned to districts for the purpose of electing or defeating specific candidates as when their choices are limited by disqualifying candidates using term limitations. In both cases the state legislature is stepping between the voter and the representative and should be stopped from doing so: "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of

---

[66] U. S. Term Limits v. Thornton, 115 S.Ct. 1842, 1851 (1995).

candidates, or to evade important constitutional restraints."[67]

Appellants urge this Honorable Court to remand this case for trial so they can prove their case that Ohio's 1992 redistricting attempted to dictate electoral outcomes and evade important constitutional restraints.

III. Do Article I, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution require that a state introduce evidence to justify any deviation in population, no matter how small, among districts used to elect members of the United States House of Representatives when alternative plans were available that would have produced districts having exactly equal populations?

Ohio could have adopted equally populous Congressional districts but did not.

Although adopting equi-populous districts does not insulate a redistricting plan from Constitutional scrutiny[68], rejecting equi-populous districts certainly requires scrutiny and

---

[67] U. S. Term Limits, Inc. v. Thornton, 115 U.S. 1842, 1869 (1995).

[68] See, e.g., Pope v. Blue, 809 F.Supp. 392, 395 (W.D.N.C. 1992), aff'd. 506 U.S. 801 (1992)[N. C. districts all had 552,386 or 552,387 persons]; Shaw v. Hunt, 116 S.Ct. 1894 (1996) and see Bush v. Vera, 116 S.Ct. 1941, 1976 (1996)(Thomas, J., concurring)[Texas districts all equal in population].

establishes the need for a trial in this case.

Over thirty years ago Wesberry[69] applied the "one voter, one vote" principle to Congressional elections, finding that Article I, Section 2 requires that "as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." Today, it is "practicable" to reach exact equality and that is what Wesberry requires.[70]

Ohio's argument that a variation of only nine people is prima facie evidence of a good faith effort for equality has already been weighed in the balance and found wanting in Kirkpatrick v. Preisler[71]:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard. . . . [That] standard requires that the State make a good-faith effort to achieve **precise mathematical equality**.... Unless population variances among congressional districts are shown to have resulted despite such effort, **the State must**

---

[69] Wesberry v. Sanders, 376 U.S. 1 (1964).

[70] Wesberry stated that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." (at 17-18) Classification of voters by party membership, prior voting patterns, age, income or other factors, and using that information to draw election district lines to elect one person and defeat another is thus per se unconstitutional under Wesberry.

[71] 394 U.S. 526, at 530-531 (1969) (emphasis added).

justify each variance, no matter how small.

Under the test adopted by this Court in 1983 in Karcher v. Daggett[72], whenever Congressional districts exhibit population deviations, no matter how small, the state must justify its violation of the principle that "absolute population equality [is] the paramount objective of [Congressional] apportionment."[73] That decision also rejected Ohio's argument:

> We thus reaffirm that there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, [Section] 2, without justification.[74]

The Karcher test has two parts:

(1) Those challenging the districting must show that population differences among districts could have been reduced or eliminated altogether.[75] "[I]f a plan with a smaller variation exists, the party challenging the plan has met its burden."[76]

Appellants here have met that burden by alleging that

---

[72] Karcher v. Daggett 462 U.S. 725 (1983).

[73] Karcher at 732-733.

[74] Karcher at 734, quoted in Order below, A.___-___.

[75] Karcher at 730-731.

[76] Stone v. Hechler, 782 F.Supp. 1116, 1125 (N.D.W.Va. 1992).

four plans with no variations existed[77]. If they prove that, they will prevail on this point.

(2) Once the first prong has been met, the burden of proof shifts to the State to prove that each significant variance among the districts was necessary to achieve some legitimate non-discriminatory state goal, consistently applied.[78]

The District Court in this case dismissed Appellants' claims on the ground that a variance of nine votes was not "significant"[79]. This decision is in error.

What makes nine people significant is that it is nine more than need be. Karcher involved a range in populations of 3,674 people, with a variation of 2,375 in a rejected alternative plan[80]. In more recent cases the numbers have been smaller[81]. In earlier cases the numbers were larger[82].

---

[77] A Complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. Conley v. Gibson, 355 U.S. 41 (1957).

[78] Karcher v. Daggett, 462 U.S. at 731; Stone v. Hechler, 782 F.Supp. at 1124.

[79] Order, App., A-8 - A-9.

[80] 462 U.S. at 728.

[81] See, e.g., Stone v. Hechler, supra, with variances between 95 and 230 people.

[82] Kirkpatrick v. Preisler, 394 U.S. 526, 529, f.n. 1 (1969)(range of 25,802 people).

In all those cases, "significant" variance has a clear meaning: Any variance exceeding that in the most nearly equi-populous alternative plan is a significant variance. In this case four alternative plans had exactly equal population for all districts. In such circumstances, Karcher requires the State to justify each variance it adopted. To do otherwise would reverse three decades of this Court's prior rulings.

Ohio must produce evidence to show that the populations deviations in its 1992 Congressional districting were required by the consistent application of recognized nondiscriminatory legitimate state interests.

Ohio has alleged two state interests in this redistricting:(1) "protecting" incumbents and (2) minimizing contests between incumbents. Neither of these is conceded to be a legitimate state interest in a Congressional districting[83]. However, even if they were, neither one was

---

[83] "The goal of reapportionment . . . is just representation of the people, not the protection of incumbents in a legislative body." League of Nebraska Municipalities v. Marsh, 242 F.Supp. 357, 360, 361 (D.C.Neb. 1965), app. desm'd. sub nom Marsh v. Dworak, 382 U.S. 1021 (1966). "In addition, we disapprove as inapposite the consideration of party strength as a factor in reapportionment or redistricting." Klahr v. Williams, 313 F.Supp. 148, 152 (D.Ariz. 1970), aff'd. sub nom. Ely v. Klahr, 403 U.S. 108 (1971). Accord, Good v. Austin, 800 F.Supp. 551, 556 (E.&W.D.Mich. 1992); 800 F.Supp. 557 (E.&W.D.Mich. 1992). Further, see The Illegitimacy of the Incumbent Gerrymander, 74 Texas L. Rev. 913 (1996).

consistently and impartially applied in the 1992 Ohio redistricting. There were nineteen incumbents and nineteen seats, so Ohio could have protected all nineteen incumbents. Any plan which targeted any Representative for defeat by definition did not consistently protect incumbents[84]. Likewise, the creation of two districts that each contained the residences of two incumbents shows that minimizing contests between incumbents was not a consistently applied policy.

To correct the District Court's erroneous application of Rule 12(b)(6)[85] in this case and its misreading of the requirements for numerical equality established in Wesberry, Kirkpatrick and Karcher, the Appellants respectfully appeal to this Honorable Court for an Order reversing the District Court's Order and remanding this case for trial on the merits[86].

---

[84] One Court forced to draw up a plan adopted as one criterion "avoiding unnecessary or invidious outdistricting of incumbents." Arizonans for Fair Representation vs. Symington, 828 F.Supp. 684, 688 (D.Ariz. 1992), aff'd. sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation, 507 U.S. 981 (1992). Under that test Ohio's plan would fall for its invidious treatment of Mr. Miller.

[85] No evidence has been taken in this case whatsoever. Rule 12(b)(6) has been used here to preclude Appellants from offering any evidence to support their claims, which they believe it is their right to do. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

[86] See. e.g., Voinovich v. Quilter, 507 U.S. ____, 113 S.Ct. 1149 (1993), remanding Ohio's state legislative reapportionment for further proceedings because an inequality

CONCLUSION

The District Court erred when it rejected the conclusion that the neutrality principle embodied in our Constitution and its Amendments requires strict governmental evenhandedness whenever core political or religious activities are regulated, and forbids political gerrymanders.

The District Court erred when it failed to find that Article I, Section 2 of the United States Constitution forbids encroachment by the state upon the right of the people to be the sole and exclusive choosers of their U. S. Representatives, particularly by the state's adopting a gerrymander to defeat specific candidates for Congress and help or harm others.

The District Court erred when it held that an unjustified variation of nine people among Ohio's districts did not violate the requirement for precise mathematical equality established by Wesberry, Kirkpatrick, Karcher and other cases of that line. Because Ohio could have established equally populous districts and did not, it must justify its actions by presenting evidence at trial to show that such variations were the result of a consistently applied legitimate state interest.

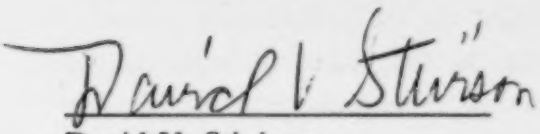
Appellants also request an award of their costs and reasonable attorneys' fees in connection herewith.

---

of population established a **prima facie** case of Equal Protection violation.

Appellants respectfully pray this Honorable Court to reverse the Order of the District Court and remand this case for trial on the merits.

Respectfully submitted,



David V. Stivison

APPENDIX

Clarence E. Miller, et al.

v.

State of Ohio, et al.

APPENDIX: PART A

Opinion and Order Below

UNITED STATES DISTRICT COURT
Southern District of Ohio
Eastern Division

CLARENCE E. MILLER, et al., Plaintiffs,	:	**JUDGMENT IN A CIVIL CASE**
vs	:	Case No. C2-94-1116
	:	Circuit Judge Norris
STATE OF OHIO, et al., Defendants.	:	District Judge Rice District Judge Smith

Filed Kenneth J. Murphy, Clerk
'96 May 29 PH 5:01
U.S. District Court Southern Dist. of Ohio
Eastern Columbus

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury. has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court . The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Court's Opinion and Order filed May 29, 1996, final judgment is hereby entered in favor of defendants and against plaintiffs, dismissing this action with prejudice.

Date: May 29, 1996

KENNETH J. MURPHY, CLERK

/s/ Georgiana Wellman
By /Deputy Clerk

No. C-2-94-1116

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE E. MILLER, et al.,)		
Plaintiffs,)		
)	**OPINION**	
vs)	**AND ORDER**	
)		
STATE OF OHIO, et al.,)		
Defendants.)		

Filed Kenneth J. Murphy, Clerk
'96 May 29 PH 4:11
U.S. District Court Southern Dist. of Ohio
Eastern Columbus

BEFORE: NORRIS, Circuit Judge, and RICE and SMITH, District Judges

ALAN E. NORRIS, Circuit Judge. This case involves a constitutional challenge to the congressional districting plan for Ohio, approved in the wake of the 1990 census. Among other allegations, plaintiffs contend that the plan's map for congressional districts is the product of bipartisan

gerrymandering[1] and, consequently, runs afoul of Article I § 2, of the United States Constitution.

Defendants, State of Ohio and several of its elected officials, have filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a viable claim. For the reasons set forth below, we agree with defendants' position and grant their motion to dismiss.

I.

This three-judge court has been convened pursuant to 28 U.S.C. § 2284(a). When reviewing a motion to dismiss for failure to state a claim, we must construe the complaint in a light most favorable to plaintiffs and accept all its factual allegations as true. *Gazette v. City of Pontiac*, 41 F. 3d 1061, 1064 (6th Cir. 1994). Accordingly, the following summary of events is taken exclusively from the complaint.

Plaintiffs consist of unsuccessful congressional candidates from both major parties, as well as Diane Kukor, an independent voter, and the Libertarian Party of Ohio. According to the complaint, defendants took part in "proposing, developing, adopting or implementing the Congressional boundaries here in dispute."

The complaint's stated purpose is "to take the State of Ohio out of the business of rigging elections." It essentially alleges that

---

[1] As plaintiffs freely acknowledge, a claim of bipartisan gerrymandering appears to be one of first impression. At first glance, students of political history might be excused for believing the term bipartisan gerrymandering to represent an oxymoron: "**gerrymander** 1. To divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving *one political party* an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." Webster's Third New International Dictionary 952 (1981) (emphasis added).

the congressional redistricting was accomplished by the state through its legislative branch, the Ohio General Assembly, with an eye towards (1) assuring the defeat of specific candidates; (2) preserving the dominance of the Democratic and Republican parties; and (3) excluding minor parties and independent voters "from the political process as much as possible." Thus, the gerrymandering alleged is bipartisan in nature and favors incumbents.

In addition to population shifts that are customarily revealed by each decennial census, the need for redistricting was driven by the fact that the size of the Ohio congressional delegation dropped from twenty-one to nineteen representatives as a result of the 1990 census. According to plaintiffs, Democratic and Republican leaders met to determine how to cope with the loss of these seats and "decided that one district then held by a Democrat would be eliminated and one district then held by a Republican would be eliminated." Although differences concerning how best to achieve these goals later arose, they were ultimately resolved by a joint House-Senate conference committee of the Ohio General Assembly.

In plaintiffs' view, the congressional districting plan that resulted "did not represent a good faith effort to achieve exact mathematical equality of population among all Ohio congressional districts" because it "incorporated unequal population totals for several districts, with maximum variance of +2 to -7 persons from exact equality, without articulating any consistently applied legislative policy which dictated this result." Furthermore, the complaint alleges that at least four redistricting plans that provided for absolute numerical equality were submitted to the appropriate legislative committees.

II.

We turn first to the claims premised upon alleged violations of Article I, § 2, of the Constitution.[2] At its core, this case asks us to determine whether the Ohio legislature interfered with the people's right to chose their representatives when it approved the current congressional map. The complaint advances two legal theories in support of its Article I claim. First, as touched upon above, it charges that the minimal population variations among congressional districts are unconstitutional in light of Supreme Court precedent. Second, the complaint states that defendants have "usurped a significant, if not dominant, role in selecting the Congressional Representatives from Ohio by consciously crafting Congressional district boundaries to facilitate election of certain incumbents and facilitate defeat of other incumbents." By thus stepping between the candidates and the electorate, defendants have allegedly failed to " institute politically neutral districting procedures," which are required by Article I, § 2.

For the sake of clarity, we address these theories separately.

A. Population Deviation

Any discussion of the constitutional implications presented by population variances among congressional districts must begin with the Supreme Court's Holding in *Wesberry v. Sanders*, 376 U.S. 1 (1964): "[C]onstrued in its historical context, the command of Art[.] I, §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional

---

[2] This section begins: "The House of Representative shall be composed of Members chosen every second Year by the People of the several States. . . ." U.S. Const. art. I, § 2, cl. 1.

election is to be worth as much as another's. *Id.* at 7-8 (footnote omitted). Recognizing the imprecision embodied in the phrase "as nearly as practicable," the Court subsequently rejected the suggestion that there could be population variations "so small that they should be considered de minimis." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). Rather, the "as nearly as practicable" admonition requires states to "make a good-faith effort to achieve precise mathematical equality." *Id.* at 530-31 (citing *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). This is so for several reasons:

> Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art[.] I, § 2, that States create congressional district which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Id. At 531.

The extent to which Article I, § 2, tolerates population discrepancies among congressional district was further refined in *Karcher v. Daggett*, 462 U.S. 725 (1983), a case that all parties recognize as central to this appeal. Unlike the population variations before the Court in *Wesberry* and *Preisler*, the deviation in *Karcher* was relatively small.[3] However, the Court reaffirmed that "there are no de minimis

---

[3] In *Karcher*, the difference between the largest and smallest district was 3,674 people. In *Wesberry* the figure was 551,526; in *Preisler* it was 25,802. In the case before us, the figure is 9.

population variations, which could practicably be avoided, but which nonetheless meet the standard of Art[.] I, § 2, without justification." *Karcher*, 462 U.S. at 734. Instead, the Court formulated the following two-part test:

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each *significant* variance between districts was necessary to achieve some legitimate goal.

Id. At 730-31 (emphasis added). Among the legislative policies that theoretically could justify some variance, the Court listed making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents. *Id.* at 740.

With this analytical framework in mind, we now turn to the facts alleged in the complaint. As already noted, the current congressional map has a maximum deviation of nine individuals. In our view, this minuscule deviation does not represent the "significant variance between districts" that *Karcher* requires before the burden shifts to the state to justify the discrepancy. Thus, we hold that when, across nineteen congressional districts, the variation in size between the largest and smallest districts is just nine persons, there is no viable claim of a violation of Article I, § 2. To hold otherwise would

not only defy common sense, it would perpetuate an unacceptable legal fiction.

In reaching this conclusion, we are mindful that other courts have read *Karcher* literally to require absolute numerical equality. *See, e.g., Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (maximum deviation of ten people requires justification by state), *aff'd without op.*, 112 S. Ct. 2269 (1992).[4] While *Karcher* undeniably includes language which supports that view,[5] we are unwilling to ignore the Court's use of the adjective "significant" in the formulation of its two-part test. Significant must mean something; if so, it surely means that a deviation of more than nine persons among congressional districts is required before the state is obliged to justify its congressional map.

B. Interference in Direct Election of Representatives

The complaint also alleges that the collusive practices of defendants in devising the challenged redistricting plan violated "the principle of direct election of representatives by the People as set forth in Article I, Section 2, of the U.S. Constitution." In contrast to their population variance argument, this theory focuses on the manner of the redistricting, which plaintiffs

---

[4] Although the Supreme Court affirmed the district court's judgment in *Anne Arundel*, this court is not bound by the lower court's reasoning on this precise issue. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 500 (1981); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.")

[5] *E.g.*, "[T]he mere existence of statistical imprecision does not make small deviations among districts the functional equivalent of equality." *Karcher*, 462, U.S. at 735.

envision as an "open and impartial" endeavor. In their view, all persons or groups with an interest in the matter, from political parties to college computer classes, should be free to submit a proposal that conforms to constitutional requirements and criteria established by the state legislature. Ultimately, "[a]ll submitted plans would . . . be judged and ranked based on their compatibility with those criteria and the one that scores best will be identified."

According to plaintiff, this reading of Article I, § 2, stems from the original intent of the founding fathers, who sought to prevent state legislatures from choosing members of the House of Representatives. Whereas Article I, § 2, provides that representatives shall be chosen by "the People," Article I, § 3, indicated that senators shall be "chosen by the Legislature." U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII, § 1. When these contrasting provisions are read in the context of the debates heard during the constitutional convention of 1787, plaintiffs conclude that Article I, § 2, does more than secure the people the right to vote for their representative; it guarantees that reapportionment itself be "fastidiously neutral and objective . . . , free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative apportionment." *White v. Weiser*, 412 U.S. 783, 799 (1973) (Marshall, J., concurring).

Such a reading of Article I, § 2, is overbroad. Justice Marshall's concurrence in *White* recognizes that the legislature retains the "primary responsibility" in the area of apportionment. *Id.* This comes as no surprise because the Supreme Court has made abundantly clear that "apportionment is a political process," *Karcher*, 462, U.S. at 739, which permits the legislature to take any number of factors into consideration when engaged in the redistricting process,

including "avoiding contests between incumbent Representatives," *id.* at 740, so long as it does so "consistent with constitutional norms." *Id*; *accord White v. Weiser*, 412 U.S. at 794.

The complaint makes no allegation that the congressional map at issue was so skewed that the legislature, not the electorate, selected the candidates. To the contrary, it charges that plaintiff Clarence Miller lost a bid for reelection in his party's primary election by a "razor thin" margin because he was targeted for defeat by defendants as the "sacrificial lamb" needed to maintain the balance between the major parties. Rather than indicate that the people have been divested of their ability to choose their representatives by the congressional map, a razor thin outcome inclines us to a contrary conclusion.[6] The complaint's other allegations are no more compelling with respect to this issue.

Given the complete absence of case law in support of a purely ministerial role on the part of the legislature in the apportionment process,[7] we decline to read Article I, § 2, to require more than that congressional members are elected by popular vote from districts whose boundaries have been drawn in a manner consistent with the Constitution.

---

[6] Although not considered in resolving this action, we note that elections subsequent to the adoption of the congressional map at issue have not unfolded with the iron-clad predictability alleged by plaintiffs.

[7] During oral argument, counsel for plaintiffs contended that the "founding fathers saw the States legislature as nothing more than administrators of these elections. Turn the lights on when you open the polls, turn them off when they close. It is a purely administrative function."

III.

Finally, we address plaintiffs' contention that defendants violated the constitutional principle of "governmental neutrality." In their view, this principle stems from an amalgam of the Equal Protection Clause, the First, Fourteenth, and Fifteenth Amendments, and even the Magna Carta.

While we acknowledge that the "concept of government as neutral referee" has been articulated in the context of specific constitutional claims, it has not yet been recognized as a discrete constitutional right. Mindful of our role as the trial court, we decline to grant relief premised on an as yet undefined constitutional right.

IV.

The Clerk shall enter a final judgment in favor of defendants and against plaintiffs, dismissing this action with prejudice

WALTER H. RICE, District Judge, concurring. Although I concur in full with Judge Norris' opinion, I write separately to emphasize two points.

First, in regard to this court's conclusion that it is not bound by the lower court's reasoning in *Anne Arundel*, even though that decision was summarily affirmed by the Supreme Court, I feel that some further explanation is necessary. As noted, *supra*, note 4, summary affirmances do not have the same precedential authority as do decisions rendered after full consideration of the merits. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). In determining the authority of a summary affirmance, courts are not inevitably bound by the reasoning which was enunciated by the lower court; instead, they are bound only by those issues which were necessarily decided in reaching the judgment. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *accord Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). In *Anne Arundel*, the lower court required the state to justify a ten-person deviation, concluded that the state's proffered justifications were sufficient, and then declared the plan to be constitutional. 781 F. Supp. at 398. In my opinion, all that is essential to sustain that court's judgment is its conclusion that the state's justifications were sufficient to render the plan constitutional. Accordingly, I do not consider this court to be bound by the *Anne Arundel* court's conclusion that the state is required to justify a ten-person deviation.

Second, I wish to address this court's rejection of the plaintiffs' argument that the defendants violated the constitutional principle of "governmental neutrality." It is clear that such a neutrality principle has been narrowly defined in the context of specific constitutional claims, most notably the First Amendment's admonition the "Congress shall make no law respecting an establishment of religion," *see, e.g. Gillette v.*

United States, 401 U.S. 437, 449 (1971) (stating that the "central purpose of the Establishment Clause [is that] of ensuring governmental neutrality in matters of religion"); the First Amendment's guarantee of freedom of speech, *see, e.g., RAV v. City of St. Paul*. 505 U.S. 377, 386 (1992) (stating that the "government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed"); and the Fourteenth Amendment's guarantee of the equal protection of the laws, *see, e.g., Romer v. Evans*, ____ S. Ct. ____ , No. 94-1039, 1996 WL 262293 (May 20, 1996) (striking down as unconstitutional a state law which "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else"); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids the use of peremptory challenges solely on the basis of race). However, the Constitution has not been broadly interpreted as setting forth a more general requirement that the government act in a neutral manner toward its citizens in matters which do not implicate specific constitutional protections. Since no specific constitutional protection is implicated here, and because there has been no constitutional recognition of a *general* principle of governmental neutrality, plaintiffs' arguments advocating such a principle in this case must fail.

Clarence E. Miller, et al.

v.

State of Ohio, et al.

APPENDIX: PART B

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE E. MILLER, et al.,	:	
	:	[Date-
Plaintiffs,	: Case No. C2-94-1116	Stamped
	:	July 26,
VS	: Circuit Judge Norris	1996]
	: District Judge Rice	
STATE OF OHIO, et al.,	: District Judge Smith	
	:	
Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 18.1 of the Rules of the Supreme Court of the United States, notice is hereby given that Clarence E. Miller, et al., Plaintiffs in the above-docketed action, hereby appeal to the Supreme Court of the United States from the final judgment of the three-judge district court panel, entered in this action May 29, 1996. This appeal is taken pursuant to 28 U.S.C. Section 1253.

David V. Stivison
870 North 30th Street
Philadelphia, Pennsylvania 19130
(215) 763-2809,
Counsel for Appellants

Of Counsel:
John B. Anderson
Distinguished Visiting Professor of Law
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale FL 33314
(305) 452-6100

John R. Greiber, Jr.
Council, Baradel, Kosmerl & Nolan, P.A.
125 West Street, Fourth Floor
P. O. Box 2289
Annapolis, Maryland 21404-2289

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 1996, I forwarded a true and accurate copy of the foregoing Notice of Appeal to the Supreme Court of the United States by overnight courier for hand delivery the next day to:

DIANE R. RICHARDS, ESQ.
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Floor
Columbus OH 43215-3428

Telephone: 614/466-2872

/s/ David V Stivison

David V. Stivison

Clarence E. Miller, et al.

v.

State of Ohio, et al.

APPENDIX: PART C

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE E. MILLER, THOMAS V. ERNEY, ROBERT J. FITRAKIS, DONALD H. HOLLISTER, DIANA D. KUKOR, THE LIBERTARIAN PARTY OF OHIO, SALVATORE PANSINO, ROBERT L. WOODALL AND STEVE GROTE,	:	
Plaintiffs,	:	
VS.	:	Case No. C2-94-1116
THE STATE OF OHIO; ROBERT TAFT II IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; GEORGE V. VOINOVICH IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF OHIO; STANLEY J. ARONOFF IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE OHIO SENATE; VERNAL G. RIFFE, JR., IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE OHIO HOUSE OF REPRESENTATIVES;: EUGENE J. WATTS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE REFERENCE AND OVERSIGHT: COMMITTEE OF THE OHIO SENATE; WILLIAM J. HEALY, IN HIS OFFICIAL CAPACITY AS CHAIRMAN	:	Judge Smith Magistrate Judge King

OF THE STATE GOVERNMENT :
COMMITTEE OF THE OHIO HOUSE OF:
REPRESENTATIVES; THE FOLLOWING:
PERSONS IN THEIR OFFICIAL :
CAPACITIES AS MEMBERS OF THE :
JOINT HOUSE/SENATE CONFERENCE :
COMMITTEE RESPONSIBLE FOR :
DEVELOPING OHIO'S 1992 :
CONGRESSIONAL REDISTRICTING :
PLAN, AM. SUB. S. B. 292: :
RICHARD H. FINAN, ROBERT J. :
BOGGS, BARRY LEVEY, BETTY :
MONTGOMERY, ALAN J. ZALESKI, :
WILLIAM L. MALLORY, CORWIN M. :
NIXON, JUDY B. SHEERER, :
MICHAEL P. STINZIANO, AND :
ROBERT L. CORBIN, :
:
Defendants. :

COMPLAINT

THREE-JUDGE DISTRICT COURT REQUESTED

TABLE OF CONTENTS

COMPLAINT

I. PLAINTIFFS 1

II. DEFENDANTS 2

III. JURISDICTION AND VENUE 3

IV. MOTION AND REQUEST FOR THREE-JUDGE PANEL 3

V. ISSUES RAISED 4

VI. LEGAL BASIS 5

COUNT I: POPULATION EQUALITY UNDER ART. I, SEC. 2 7

COUNT II: ROLE OF VOTERS UNDER ART. I, SEC. 2 11

COUNTS III THROUGH VII: PLAINTIFF MILLER 12

COUNT VIII: PLAINTIFF ERNEY 16

COUNT IX: PLAINTIFF FITRAKIS 20

COUNT X: PLAINTIFF HOLLISTER 21

COUNTS XI THROUGH XIII: PLAINTIFF KUKOR 28

COUNTS XIV THROUGH XVIII: PLAINTIFF LIBERTARIAN PARTY OF OHIO 25

COUNT XIX: PLAINTIFF PANSINO 27

COUNT XX: CITIZENS OF C.D. 4 28

COUNT XXI: PLAINTIFF WOODALL 30

COUNT XXII: PLAINTIFF GROTE 32

PRAYER FOR RELIEF 35

COMPLAINT

Plaintiffs for their complaint against defendants state:

I. PLAINTIFFS

1. Plaintiff Clarence E. Miller is a resident of the State of Ohio and living within the area served by the United States District Court for the Southern District, Eastern Division, of Ohio. He is a registered voter and former Republican member of Congress from the Tenth Congressional District ("C.D.") from the time he took office after lawful election to that position in 1966 until his final term of office ended January 3, 1993. The former Tenth Congressional District was wholly included in the area served by this Court.

2. Plaintiff Thomas V. Erney is a resident of the State of Ohio and a registered voter. In 1990 he was the Democratic challenger to incumbent Republican Congressman Chalmers P. Wylie in Ohio's 15th Congressional District, which encompassed parts of Franklin and Madison Counties.

3. Plaintiff Robert J. Fitrakis is a resident of the State of Ohio and a registered voter. In 1992 he was the candidate of the Democratic party running against incumbent Republican Representative John Kasich in Ohio's 12th Congressional District.

4. Plaintiff Donald H. Hollister is a resident of Ohio and a member of the Democratic party. In 1980 he was the Democratic candidate for Congress in the 7th Congressional District of Ohio and he is a potential future candidate for Congress.

5. Plaintiff Diana D. Kukor is a resident of the State of Ohio and an independent voter, neither a member of the Republican Party, the Democratic Party or of any other organized political party.

6. Plaintiff Libertarian Party of Ohio is an organized, but not state-recognized, political party, which has presented candidates for numerous public offices throughout Ohio for the past several elections, including one or more candidates for the U. S. House of Representatives in 1990, 1992 and 1994.

7. Plaintiff Salvatore Pansino is a resident of the State of Ohio and a registered voter. He was the Republican candidate for Congress for Ohio's Seventeenth Congressional District ("C.D. 17") in the 1992 election, running against incumbent Representative James Traficant, a Democrat, who represents and at all times relevant to this action represented C.D. 17. He is a potential future candidate for Congress.

8. Plaintiff Robert L. Woodall is a resident of the State of Ohio and a registered voter. He was the Republican candidate for Congress for Ohio's 21st Congressional District ("C.D. 21") in 1980 and 1984, in each case opposing incumbent Louis Stokes. He is a potential future candidate for Congress.

9. Plaintiff Steve Grote is a resident of the State of Ohio and a registered voter. He was the candidate of the Republican party for C.D. 1 in the 1992 election. He is a potential future candidate for Congress.

II. DEFENDANTS

10. Defendants other than the State of Ohio are all officeholders in and of the State of Ohio who, acting under

color of state law, have or had responsibility for proposing, developing, adopting or implementing the Congressional boundaries here in dispute, as more fully set forth below. All individual Defendants are sued in their official capacity. This suit will have statewide application.

11. Because the Constitutional violations alleged in this Complaint occurred under color of the laws of the State of Ohio, the State of Ohio is a proper party defendant and is hereby joined in this suit as Defendant, as it was, e.g., in Armour, et al. v. State of Ohio, et al., 925 F.2d 987 (6th Cir. 1991).

III. JURISDICTION AND VENUE

12. This Court has original jurisdiction of this action pursuant to 28 U. S. C. Sections 1343 (3) and 1343 (4) and Section 1357. Venue is proper in the United States District Court for the Southern District of Ohio - Eastern Division under the provisions of 28 U. S. C. Section 1391 (b).

IV. MOTION AND REQUEST FOR THREE-JUDGE PANEL

13. Plaintiffs hereby apply, petition, move and request this Honorable Court to convene a three-judge Court to hear and determine this suit pursuant to the provisions of 28 U. S. C. Section 2284 (a). Convocation of a three-judge District Court is required because this suit challenges the constitutionality of the apportionment of congressional districts in the State of Ohio, as embodied in Amended Substitute Senate Bill Number 292 (119th General Assembly), which is codified at Ohio Revised Code Section 3521.01 et seq. A map of Ohio showing the boundaries of

the U. S. House of Representatives districts established by this Bill is appended hereto as Attachment 1 and incorporated herein.

14. Pursuant to 28 U. S. C. Section 2284 (b)(2), notice of this suit has been given to the Governor and the Attorney General of the State of Ohio by sending each via certified mail a copy of this Complaint.

V. ISSUES RAISED

15. The Defendants named above - the State of Ohio and many of its executive and legislative officers - have, under color of the laws of the State of Ohio, violated the Complainants' rights under the United States Constitution and amendments thereto, by consciously drawing the boundaries of Ohio's congressional districts to assure the defeat of specific candidates for Federal office and to facilitate the election of others; to preserve the power of the Democratic and Republican parties in Ohio; and to exclude minor parties, their candidates and members, and independent voters of every kind, from the political process as much as possible, all for the purpose of denying equal partici- pation by all voters in the election of members to the U. S. House of Representatives, intentionally discriminating against identifiable political groups and individuals and achieving an actual discriminatory effect on these individuals and political groups, substantially disadvantaging these voters in their opportunity to effectively influence the political process. This was achieved by the crafting of a bipartisan political gerrymander of Ohio's Congressional district boundaries following the 1990
U. S. Census.

16. The purpose of this Complaint is to take the State of Ohio out of the business of rigging elections. Plaintiffs believe that the U. S. Constitution requires that the State be absolutely neutral in all aspects of elections by the people to Federal political office and not take sides for or against any specific candidate or political party in any election. To achieve this result, Plaintiffs ask that the U. S. District Court for the Southern District of Ohio order the General Assembly of the State of Ohio to adopt a redistricting mechanism free of political manipulation, as described more fully herein.

VI. LEGAL BASIS

17. The actions of the Defendants as set forth above violate the following provisions of the Constitution of the United States of America, as amended:

a) Article I, Section 2, of the Constitution of the United States which provides, in pertinent part, that Members of the House of Representatives be chosen "by the People of the several states" [emphasis added]. The Ohio legislature, the Democratic Party and the Republican Party in Ohio, like a prism that distorts all light passing through it, have unconstitutionally thrust themselves between the People of the State of Ohio and those candidates seeking to represent them in the U. S. House of Representatives, subverting the principle of direct election by purposefully manipulating Congressional district boundaries to achieve politically partisan goals.

b) Article I, Section 2 of the Constitution, in its requirement that the State of Ohio make a good-faith effort to achieve precise mathematical equality in population among

the Ohio Congressional districts. The State of Ohio did not do so, rejecting several plans that would have achieved exact mathematical equality in favor of a plan that had substantial population variances, which variances the State of Ohio made no attempt to justify based on a consistently applied state legislative policy. On this basis alone, even if on no other, the districting plan adopted in Am. Sub. S. B. 292 was and is unconstitutional.

c) Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**. (Emphasis added)

d) The First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment, particularly by abridging the right of the Plaintiffs or some of them to fully exercise without punishment their rights of free speech, the right peaceably to assemble and to petition the Government, including without limitation their right to form political parties and participate in the political process through that mechanism.

e) The principle of governmental neutrality, requiring every State to govern impartially, embodied in the First and Fourteenth Amendments. The Ohio laws challenged here give the two established parties a decided advantage over any new parties struggling for existence; an

opportunity to unfairly protect those incumbents chosen by the leaders of the two parties, promote favored challengers and engineer the defeat of disfavored challengers or incumbents; and the ability to exclude independent voters from any effective participation in crucial political decisions, stifling the competition in ideas and governmental policies which is at the core of our electoral process and of First Amendment freedoms.

18. In addition, by these acts Defendants conspired to violate the Constitutional rights of Plaintiffs in violation of

Title 42, Section 1983 et seq. of the U. S. Code.

COUNT I

19. Following the certification of the results of the 1980 Census and pursuant to H. B. No. 953 (114th General Assembly)(effective April 5, 1982, superceded by Am. Sub. H.B. 160 (116th General Assembly), effective July 12, 1985), Ohio was divided into twenty-one Congressional districts corresponding to the number of members of the U. S. House of Representatives Ohio was authorized to choose based on its proportion of the total U. S. population. The boundaries of those districts were as shown in Attachment 2.

20. Following the certification of the results of the 1990 Census, and based on the proportion between the population of Ohio and that of the total population of the United States, the voters of the State of Ohio had the right to choose nineteen members of the U. S. House of Representatives.

21. Upon information and belief, the leaders of the Ohio Republican and Democratic parties, including, among

others, Vernal G. Riffe, Jr., Speaker of the Ohio House of Representatives (Democrat) and Stanley J. Aronoff, President of the Ohio Senate (Republican), met to discuss the redistricting of Ohio mandated by the results of the 1990 Census, including the subject of the loss of two Congressional seats as a result of that Census.

22. At that time, Ohio's Congressional delegation consisted of eleven Democrats and ten Republicans.

23. Democratic Congressmen Donald J. Pease (C.D. 13) and Dennis E. Eckart (C.D. 11) had previously announced that they would not run for Congress in 1992.

24. Upon information and belief, the aforementioned leaders of the Republican and Democratic parties decided that one district then held by a Democrat would be eliminated and one district then held by a Republican would be eliminated.

25. This bipartisan agreement paralleled the result which occurred after the Census of 1980 was certified, when it became clear that Ohio's Congressional delegation would drop from twenty-three (23) members to twenty-one (21) members. The 1980 elections had sent thirteen (13) Republicans and ten (10) Democrats to Congress from Ohio. By 1982, two of the Republican Congressmen were retiring to run for statewide office and no Democratic incumbent wished to retire. Partisan control was divided at the statehouse, as it was again in 1992. Plaintiffs believe and therefor aver that an agreement was reached between leaders of the two major political parties that one "Democratic seat" would have to be eliminated to balance the loss of one "Republican seat". To accomplish that, the Ohio Congressional boundaries were drawn to produce a new C. D. 19 which paired two incumbent Democrats against each other in the most contorted district in Ohio history. This

experience established the pattern again followed in 1992 of bipartisan gerrymandering to apportion seats between the two major political parties, specifically selecting the "sacrificial lamb" and then attempting to rig the boundaries so the elections would follow their pre-ordained course and return the anointed incumbents to Congress.

26. In January 1992 a ten-member bipartisan committee on redistricting was appointed by Defendants Riffe and Aronoff to devise a districting plan acceptable to both major parties. Members of that committee were Defendants Senate President Pro Tempore Richard H. Finan (R-Cincinnati); Senate Minority Leader Robert J. Boggs (D-Jefferson); Senator Barry Levey (R-Middletown); Senator Betty Montgomery (R-Perrysburg); Senator Alan J. Zaleski (D-Vermilion); House Majority Leader William L. Mallory (D-Cincinnati); House Minority Leader Corwin M. Nixon (R-Lebanon); Representative Judy B. Sheerer (D-Shaker Heights); Representative Michael P. Stinziano (D-Columbus) and Representative Robert L. Corbin (R-Dayton). When this joint committee could not agree on a districting plan, each major party passed its own plan in the legislative chamber it controlled. These differing House and Senate versions of a redistricting Act were then referred to a joint House-Senate Conference Committee consisting of the same above-named individuals who had comprised the earlier bipartisan committee. The boundaries agreed upon by the members of this conference committee were embodied in Am. Sub. S. B. 292 as it was adopted by the Ohio legislature.

27. At various times, several differing plans were presented to members of the Ohio legislature to provide for the redistricting of the state into nineteen districts. Ten separate plans drawn impartially, with no regard for any

predetermined political result, were submitted to legislative committees by the Center for Research Into Governmental Processes, Inc., an Ohio non-profit research and education organization formed in 1989. Four of these ten plans provided for absolute numerical equality in population for all nineteen districts. One of the other six impartially drawn plans with nearly equal but not exactly equal populations in each district was introduced into the legislature as House Bill 722 (119th General Assembly) by Rep. Joan Lawrence (R-Galena). This politically neutral plan was drawn to split only 14 counties, maximize compactness and meet Constitutional population equality requirements by maintaining a variation in population less than plus or minus one per cent from a perfectly equal population division, and maintain minority representation.

28. On March 26, 1992, Amended Substitute Senate Bill 292 was adopted by the Ohio House of Representatives by a vote of 68 to 29 and the Ohio Senate by a vote of 28 to 5. This Act was signed into law by Defendant Governor George Voinovich and applied and enforced by Defendant Secretary of State Robert A. Taft, II, in the Congressional elections held in 1992. This Act incorporated unequal population totals for several districts, with maximum variance of +2 to -7 persons from exact equality, without articulating any consistently applied legislative policy which dictated this result. It also split twenty counties between two or more different Congressional districts. Keeping political subdivisions whole as much as possible, while not Constitutionally required, is one widely accepted component of fair districting. Excessive splitting of counties as was done here is one well-recognized hallmark of gerrymandering.

29. Because Am. Sub. S. B. 292 did not represent a good faith effort to achieve exact mathematical equality of population among all Ohio Congressional districts, in fact pointedly ignoring plans that would have achieved that Constitutional imperative, and because the Congressional districts established by that Act depart significantly from exact population equality with no justification for those deviations based on a consistently applied state legislative policy, the Act violates Article I, Section 2, of the U. S. Constitution, as interpreted by the U. S. Supreme Court in Wesberry v. Sanders, 376 U.S. 1 (1964), Karcher v. Daggett, 462 U.S. 725 (1983), and their progeny.

COUNT II

30. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 29.

31. The activities alleged above violate the principle of direct election of representatives by the People as set forth in Article I, Section 2, of the U. S. Constitution. The State of Ohio, its legislature and leaders of the Republican and Democratic Parties usurped a significant, if not dominant, role in selecting the Congressional Representatives from Ohio by consciously crafting Congressional district boundaries to facilitate election of certain incumbents and facilitate defeat of other incumbents and candidates. Defendants have stepped between the voters of Ohio and the candidates who seek to represent them in the U. S. Congress in violation of Article I, Section 2 of the U. S. Constitution. Plaintiffs in this case ask the Court to make them step aside. The only way Ohio voters can make the decisions vouchsafed to them and them alone by Article I, Section 2 of the U. S.

Constitution is to institute politically neutral districting procedures and criteria, which this Honorable Court is now asked to do.

COUNT III

32. In addition to the general harm done to each and every Ohio voter by the Defendants' actions in this case, the individual and party Plaintiffs herein have suffered specific and individual harm at the hands of Defendants, which is set forth more particularly below.

33. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 32 above.

34. Plaintiff Clarence E. Miller of Lancaster, Ohio, was first elected to serve as Republican Representative from the 10th Congressional District in 1966, the first election held after Ohio's Congressional boundaries were realigned to satisfy the "one man, one vote" mandate of Wesberry v. Sanders, 376 U.S. 1 (1964). He represented Ohio's C.D. 10, as it was from time to time constituted, continuously from that time until January 3, 1993.

35. Am. Sub. S. B. 292 split former District 10, represented by Plaintiff Miller, among four districts:

a. Congressman Miller's residence and 103,461 people in Fairfield County were included in new Congressional District 7, then represented by incumbent Congressman David L. Hobson, R-Springfield.

b. Some 218,701 people were shifted to new Congressional District 6, then represented by incumbent Congressman Bob McEwen, R-Hillsboro. New Congressional District 6 then contained 342,680 people (60.0% of the total) who had also been included in the

former District 6, 218,701 from former District 10 (38.3% of the total) and 9,520 (1.7% of the total) who had been included in former District 18. This is shown on Attachment 3 hereto.

c. Another 186,706 people were moved to new Congressional District 18, then represented by incumbent Congressman Douglas Applegate, D-Steubenville.

d. The remaining 17,607 people were assigned to new Congressional District 12, then represented by incumbent Congressman John R. Kasich. The distribution of these areas and voters to new districts is shown on Attachment 4 hereto.

36. With the loss of two Ohio seats, district numbers 20 and 21 were rendered obsolete. Former districts 20 and 21 were located in the far northeastern part of the state. The numbering pattern used throughout the 1980's was not retained in the redistricting, however. Former "District 10" represented by Rep. Miller for more than two decades ceased to be the designation for a southeastern Ohio congressional district and instead became the designation for a new district in Cuyahoga County, evidence that Congressman Miller's District had been consciously and specifically singled out for annihilation.

37. The Congressional districts as drawn by Am. Sub. S. B. 292 presented Congressman Miller with a "checkmate gerrymander": Like a king check-mated in a game of chess, any move he made, or no move, would require his running against a well-entrenched incumbent.

38. Other than Congressman Miller, the plan was drawn to protect all other incumbents - both Republican and Democrat -and was defended on that ground by some or all of the Defendants. No other incumbent Representative in

Ohio was targeted for defeat. 39. Defendants, particularly Defendants Aronoff, Riffe and Sheerer, publicly stated that one Republican Congressman would have to be singled out for elimination in the downsizing of Ohio's Congressional delegation. If Rep. Miller had been a Democrat he would not have been targeted for defeat. Instead, he was singled out as the Republican sacrifice to keep the Ohio delegation in "political balance", in clear and unequivocal discrimination based on the exercise of his First Amendment right of free association with others to constitute the Republican party in Ohio.

40. The results described in the above paragraphs were known, expected and planned by the Defendants or some of them.

41. Clarence E. Miller entered the Republican primary for new Congressional District 6, running against incumbent Republican Representative Bob McEwen. Rep. Miller lost this primary fight by a razor-thin margin. This was the only 1992 primary in the United States that pitted two Republican congressmen against each other.

42. The concerted action by the Defendants to enact into law a politically gerrymandered redistricting for the State of Ohio that targeted former District 10 for fragmentation among four new districts and specifically targeted Congressman Clarence E. Miller for defeat violated the rights of Plaintiff Miller and the people of south east Ohio under Article I, Section 2 of the Constitution of the United States by denying to them the right to be the exclusive choosers of their representative to Congress.

COUNT IV

43. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 42.

44. The concerted action by Defendants as described above violated the rights of Plaintiff Miller under the first section of the Fourteenth Amendment to the Constitution of the United States by denying to him the equal protection of law.

COUNT V

45. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 44.

46. The concerted action by Defendants as described above abridged both the right of Plaintiff Miller to free speech and his right of free association based on his membership in the Republican party in Ohio, in violation of the 1st Amendment to the U. S. Constitution as applied to the states by the 14th Amendment.

COUNT VI

47. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 46.

48. The concerted action by Defendants as described above violated the requirements of governmental neutrality and impartiality toward parties and candidates contained in the 1st and 14th Amendments to the Constitution of the United States. Simply put, the State has no business favoring one candidate or party over another. The neutrality principle embodied in the 1st and 14th Amendments to the U. S. Constitution prohibits the State of Ohio from trying to rig Congressional elections.

COUNT VII

49. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 48.

50. Defendants conspired among themselves to violate the civil rights of Plaintiff Miller as detailed above, in violation of the protections provided to him by Title 42 U.S. Code, Section 1983 et seq.

COUNT VIII

51. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 50.

52. The actions of the Defendants to protect incumbent Republican Representative Chalmers P. Wylie in Ohio's fifteenth Congressional District ("C.D. 15") violated the right of Plaintiff Thomas V. Erney under the U. S. Constitution to compete for that seat on a level playing field. In 1990 Mr. Erney was the candidate of the Democratic Party against Rep. Wylie in C.D. 15, which then encompassed parts of Franklin and Madison Counties. In that election Erney received 40.8% of the vote. The remapping of that district by Am. Sub. S. B. 292 in 1992 increased the Republican majority in C.D. 15, for the purpose of deterring Mr. Erney or other challengers from opposing Representative Wylie in the 1992 Republican primary or general election.

53. The history of this district graphically illustrates the history and effect of this and previous gerrymanders by the Ohio legislature. From the beginning of this century until 1965 Franklin County was, by itself, a congressional district, and it bore the number 12. As the population of the county grew, the voters of C.D. 12 became more and more

underrepresented. In the wake of Wesberry v. Sanders, Franklin County was finally divided, by the congressional redistricting of 1965.

54. Republicans were in control of the statehouse in 1965. When they drew the new district boundaries, they engaged in the practice known as "cracking": They divided the concentration of Democratic voters primarily located in the City of Columbus evenly between two districts, drawing the lines so that the voting strength of the predominantly Republican suburbs and outlying rural areas would more than counterbalance that of urban Democrats. The county was split between an eastern district which retained congressional district number 12, and a western district which became C.D. 15. Then-State Rep. Chalmers P. Wylie became the new Congressman from C.D. 15. See Attachment 5, figure 5a. C.D. 12 had a Democratic index of 45.4 and C.D. 15 had a Democratic index of 44.2. [The "Democratic Index" is a measure of the relative propensity of jurisdictions to vote for major party candidates. The Democratic Index, or "D.I.", is the expected vote for a Democratic candidate in an open district election - i.e., one in which there is no incumbent running - where certain theoretical conditions are imposed on statewide voting patterns. Where there are only candidates from the two major parties, Republican strength increases as the D.I. goes down and vice versa.]

55. Both of the new districts, however, were then underpopulated by the standards being used by the courts at that time, so after the 1966 election, the State of Ohio adopted a new Congressional districting plan with much smaller population variances. The plan of January 29, 1968, continued to split Franklin County into an eastern and a western district. To the eastern C.D. 12 were added

Delaware and Morrow Counties. To the western C.D. 15 were added Madison and Pickaway Counties. C.D. 12 had a Democratic Index of 45.5 and C.D. 15 had a Democratic Index of 43.1, preserving the significant Republican advantage in both districts. See Attachment 5, figure 5b.

56. After two elections using those boundaries, the Census of 1970 required yet another redistricting. By this time a Democratic governor had been elected, so that a bipartisan compromise was necessary. In a preview of the events of 1992, the bipartisan gerrymander adopted in 1972 attempted to assure the re-election of incumbents of both parties and this was clearly the intent in the central Ohio districts C.D. 12 and C.D. 15. C.D. 12 was nearly identical to the previous plan. Except for losing Pickaway County, C.D. 15 was also the same as before. The new C.D. 12 had a Democratic Index of 44.5 and the new C.D. 15 had a Democratic Index of 42.5, making it the most "Republican" district in Ohio at that time. See Attachment 5, figure 5d.

57. Early in 1975, Democrats in the state legislature tried to pass a redistricting bill before Democratic Governor John J. Gilligan was replaced by Republican Governor James A. Rhodes. They failed. Their plan, however, would have created for the first time a Democrat-dominated congressional district in Franklin County, proposing a district noted at the time as resembling a battleship.

58. This Democrat-dominated "battleship" district re-appeared in Senate Bill 283 (Valiquette)(112th General Assembly), passed by the Democrat-controlled Ohio Senate in the summer of 1977. See Attachment 5, figure 5c. Although Republican James A. Rhodes was still Governor, the Democrats had obtained a veto-proof majority in both chambers of the Ohio legislature in the election of 1976.

The bill was still in the House Rules Committee, however, when the 112th General Assembly ended, and by the time the 113th General Assembly convened, the Democrats had lost their veto-proof majority.

59. Districts 12 and 15 were redrawn by the Republican-controlled Senate in 1982 but that redistricting was successfully challenged for its lack of absolute population equality among the districts. See Flanagan v. Gillmor, 104 S.Ct. 2672 (1984). A new districting plan was adopted in May, 1985, which made only minor changes in C.D. 15.

60. In 1990 the long-time Republican incumbent in C.D. 15, Chalmers Wylie, faced stiff opposition in the Republican primary from Clifford Arnebeck. Plaintiff Thomas Erney, the Democratic candidate in the general election, received 40.8% of the vote. To protect incumbent Republican Chalmers Wylie from a 1992 challenge by Plaintiff Thomas Erney or others, the 1992 Ohio redistricting modified C.D. 15's boundaries to produce a decrease in the Democratic Index of the district from 44.3 to 42.6. See Attachment 5, figure 5f.

61. Although Chalmers Wylie withdrew from the 1992 race just before the filing deadline for the primary, the Republican candidate Deborah Pryce reaped the benefit of the gerrymander tailored to Wylie's re-election: She defeated Democratic candidate Richard Cordray in the 1992 general election by 44.1% of the vote to 37.9%, with an independent candidate receiving 18.0%.

62. Am. Sub. S. B. 292, by specifically redrawing the boundaries of C. D. 15 to facilitate the re-election of Plaintiff Erney's 1990 opponent, incumbent Republican Chalmers P. Wylie, violated:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the principle of governmental neutrality embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association guarantees of the 1st Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq., all as they apply to Plaintiff Erney.

COUNT IX

63. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 62 above.

64. Plaintiff Robert J. Fitrakis was also victim of the events described above. District 12 was redrawn in the 1982 redistricting to increase the chances of then-State Senator John Kasich to take that seat away from Democrat Robert Shamansky, who had held it only one term. See Attachment 5, figure 5e. This strategy was successful and John Kasich won in C.D. 12 in 1982 by a narrow margin and was subsequently re-elected from that district each election thereafter. As described above, the 1992 remap paid special attention to protecting incumbent Chalmers P. Wylie of the 15th District from challenge. This led to a configuration for C.D. 12 that produced a slightly higher Democratic Index (47.8 after remap vs. 46.5 before) but carried over 79.7% of the voters in Kasich's old district. This was enough to assure that the Defendants' goal of returning all incumbents to office except Rep. Miller was successful in the 12th C.D. Rep. Kasich defeated Plaintiff Democratic challenger Robert Fitrakis 71.3% to 28.7%.

65. The actions of Defendants as set forth above violated:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the right to a neutral districting procedure free from partisan manipulation guaranteed by the neutrality principle embodied in the 1st and 14th Amendments to the U. S. Constitution; d. the free speech and free association guarantees of the 1st Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq., all as they apply to Plaintiff Fitrakis.

COUNT X

66. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 65 above.

67. The long history of manipulation documented above also applies to several other C.D.'s as redrawn by Am. Sub. S. B. 292. One such example is C. D. 7 in west central Ohio, represented by Republican Clarence Brown [Sr.] starting in 1936 and then by his son Republican Clarence Brown, Jr. starting in 1965.

68. Plaintiff Donald Hollister was Rep. Clarence Brown Jr.'s Democratic challenger in 1980 and received 23.9% of the vote in that election.

69. In 1982 Clarence Brown, Jr., gave up that Congressional seat to run for Governor. Ohio was losing two Congressional seats that year, so C.D. 7 was a vacant seat that could have been broken up without endangering incumbents of either party.

70. Republicans controlled the Ohio Senate by just three votes that year. To pass a Congressional redistricting bill, they could not afford defections. Then-State Senator Mike DeWine was reportedly considering defection unless C.D. 7 was retained virtually intact and free of other incumbents to allow him a safe district in which to run for Congress. That condition was met. Except for one township in Champaign County and one township in Montgomery County, all of the old C.D. 7 was preserved. Added to it, and extending it eastward south of Columbus were Pickaway and parts of Madison and Fayette Counties. The resulting configuration resembled the letter "C". See Attachment 6, figure 6a. State Senator Mike DeWine, the ordained successor to Rep. Brown, was elected handily.

71. Plaintiff Donald Hollister did not then run against Rep. Dewine in C.D. 7 after the 1982 remap.

72. In 1990 Rep. Dewine gave up his seat to be George Voinovich's running mate for Lieutenant Governor. State Senator David Hobson ran for the open seat and became the new incumbent.

79. When C.D. 7 was redrawn in 1992 by Am. Sub. S. B. 292, it retained much of its original territory: Rep. Hobson carried over 80.8% of his old district into the new district. As part of the "checkmate gerrymander" to force out Plaintiff Clarence Miller, C.D. 7 was extended counter-clockwise around central Ohio by the addition of Fairfield County, so that it now encircles Columbus about two-thirds of the way around. See Attachment 6. figure 6b. The District's Democratic Index dropped from 44.2% to 43.4% after the remap, thus further protecting the then-incumbent Rep. Hobson. His challenger in the 1992 election, Democrat Clifford Heskett, received 28.7% of the vote, or only about

five per cent better than Plaintiff Hollister did in 1980.

74. This persistent pattern of gerrymandering covering decades and culminating in 1992 with Am. Sub. S. B. 292 was intended, in part, to protect the incumbent Congressman in C.D. 7, whoever that was at the time, and was successful. As a consequence neither Plaintiff Hollister nor any other challenger to the incumbent has a realistic opportunity of carrying C.D. 7. 75. Therefore, the actions of Defendants violated the rights of Plaintiff Hollister and all other challengers and potential challengers of incumbent Representatives, as those rights are established and protected by:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the principle of governmental neutrality embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association guarantees of the 1st Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq., all as they apply to Plaintiff Hollister and others similarly situated.

COUNT XI

76. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 75.

77. Plaintiff Diana D. Kukor is an independent voter, not a member of the Republican, the Democratic or any other political party.

78. The actions of the Defendants challenged in this case intentionally discriminated against independent voters

and had a discriminatory effect that consistently degrades that group's influence on the political process as a whole, in violation of the Equal Protection rights of Plaintiff Diana Kukor and all other independent voters. A political gerrymander consistently degrades the influence of independent voters by deliberately drawing each district to produce a lopsided contest that favors a specific major party candidate - whether Democrat or Republican - and assures that independents' votes count for very little.

79. The First Amendment right of free association and petition of Plaintiff Diana Kukor and all other independent voters was violated by the actions of Defendants in that she and they were discriminated against for not being associated with either the Democratic or Republican parties.

COUNT XII

80. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 79.

81. Defendants violated the right of Plaintiff Diana Kukor and all other independent voters under the neutrality principle embodied in the 1st and 14th Amendments to the U. S. Constitution, by purposefully presenting her and them with the product of a bipartisan gerrymander designed to diminish the impact and value of their votes instead of a map drawn using neutral districting principles.

COUNT XIII

82. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 81.

83. The deprivation of Plaintiff Diana Kukor's civil rights by Defendants violates 42 U.S.C. Section 1983, et seq.

COUNT XIV

84. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 83.

85. Plaintiff the Libertarian Party of Ohio is an organized, but not state-recognized, political party active in the State of Ohio. Candidates of the Libertarian Party who reflect its views have participated in Congressional elections in 1990, 1992 and all other times relevant to this case. The process of redistricting in 1992 was carefully and completely controlled by members and representatives of the two dominant political parties in Ohio to the complete exclusion of the Libertarian Party and similarly situated non-dominant political parties from any meaningful participation or influence.

86. The conduct set forth in the above paragraphs abridged the right of the Libertarian Party and other minor parties similarly situated to freely associate with other persons of the same political persuasion by denying or limiting their collective ability to elect candidates of their choice or otherwise influence the political process in Ohio, in violation of the 1st and 14th Amendments to the U. S. Constitution.

COUNT XV

87. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 86.

88. The conduct set forth above also violated the right of the Libertarian Party and other minor parties similarly situated to a "level playing field" required by the principle of government neutrality embodied in the 1st and 14th Amendments to the U. S. Constitution.

COUNT XVI

89. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 88.

90. The conduct set forth above also violated the right to equal protection guaranteed by the 14th Amendment to the U. S. Constitution by allowing the two dominant parties to exclude Plaintiff Libertarian Party and all other minor political parties similarly situated from meaningful participation in the redistricting process.

COUNT XVII

91. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 90.

92. The delegation of redistricting to the two dominant political parties allowed the maximum possible denigration of the right of the individual voter, in violation of Article I, Section 2 of the U. S. Constitution.

COUNT XVIII

93. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 92.

94. The conduct set forth above violated the civil rights of the members, candidates and potential candidates for

Congress representing the Libertarian Party and other minor parties similarly situated in violation of 42 U.S.C. Section 1983 et seq.

COUNT XIX

95. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 94 above.

96. In 1992 Plaintiff Salvatore Pansino was the Republican candidate for C.D. 17, located on Ohio's eastern edge near its northern border. The incumbent in that district was Rep. James Traficant, Democrat, whose position was protected in the 1992 redistricting by including 97.5% of his old district in the redrawn one. Plaintiff Pansino received 15.9% of the votes cast in the 1992 election and Rep. Traficant was re-elected, as Defendants in this case intended.

97. The Constitutional question in this controversy is not whether Mr. Pansino, or any other political candidate who is a co-Plaintiff in this case, could have or would have been elected to the office they sought but for the actions of the Defendants. The question is whether the actions of Defendants denied them of a fair and equal opportunity to participate in the process of electing Representatives to Congress. Because the boundaries of C.D. 17 were drawn to make it easy for the existing incumbent to return to Congress, Am. Sub. S. B. 292 violated Mr. Pansino's rights guaranteed under:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the right to a neutral districting procedure free

from partisan manipulation as required by the neutrality principle embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association rights protected by the 1st Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq.

COUNT XX

98. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 97 above.

99. In some districts the legacy of past and current boundary manipulation has been so successful that it has become virtually unchallenged. One such district is C.D. 4 in north- western Ohio, where in 1994 no Democrat even filed to run for the seat held by incumbent Republican Rep. Michael Oxley. Driven by political winds, this District has been moving eastward since 1972. At that time the District included three counties bordering on Indiana and had returned Republican William McCullough to Congress every election since 1948. Two of the three counties bordering Indiana were removed and Hancock County was added to C.D. 4 (See Attachment 7, figure 7a) so that then-State Sen. Tennyson Guyer of Hancock County could run in the seat vacated by Rep. McCullough's retirement and not have to challenge incumbent fellow Republican Delbert Latta in C.D. 5. Rep. Guyer was elected in 1972 and re-elected subsequently until his death in 1981. A special election in June 1981 pitted Democrat Ohio Rep. Dale Locker against Republican Ohio Rep. Michael Oxley, who won that race with a very slim 292-vote margin. To help assure that C.D.

4 would stay in Republican hands, the 1982 redistricting lopped off the last remaining Indiana border county - Mercer, the only rural western Ohio county that is even close to a Democrat majority, and a strong base for Rep. Locker in his State House elections. The 1982 C.D. 4 boundaries were extended eastward through a narrow "neck" in the City of Mansfield to pick up Knox County. See Attachment 7, figure 7b. The resulting configuration had a D.I. of only 41.9%, making it very difficult for a Democratic candidate to challenge Rep. Oxley. He was re-elected throughout the 1980's and the 1992 remap of C.D. 4 by Am. Sub. S. B. 292 retained 84.2% of his former district. See Attachment 7, figure 7c.

100. This suit challenges the Constitutionality of each and every District boundary adopted in 1992, including the boundaries for C.D. 4. The 1992 boundary for this District as established by Am. Sub. S. B. 292 violates the rights of challengers and potential challengers in C.D. 4 and denigrates the rights of each of the citizens in that District as those rights are guaranteed by:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the right to a neutral districting procedure free from partisan manipulation required by the neutrality principle embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association clauses protected by the 1st Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq.

COUNT XXI

101. Plaintiffs incorporate and adopt by reference the allegations set forth in Paragraphs 1 through 100 above.

102. The pattern of conscious political gerrymandering stretching back over decades as sketched out in previous allegations has also harmed former and potential future Congressional candidate Plaintiff Robert L. Woodall, who ran as Republican challenger against Rep. Louis Stokes in C.D. 21 in 1980 and 1984. This District was redesignated C.D. 11 in the 1992 plan.

103. Ohio's first minority-majority Congressional district, C. D. 21, was created by the redistricting plan of January 29, 1968. Congressman Louis Stokes held this eastern Cleveland district from 1968 onward.

104. After 1976 the incumbent in C. D. 20, which included the western side of Cleveland, was Rep. Mary Rose Oakar, a Democrat. The Cleveland suburbs were included in C. D. 22, covering most of the eastern side of the city, where Democrat Charles Vanik was elected in 1968 and 1970. The western and southern sides of Cleveland were contained in C. D. 23, which elected a Republican, William Minshall, in 1968 and 1970.

105. In the redistricting of 1972, the lines were drawn to help re-elect all four of these incumbents and all four were returned to Congress in the election of 1972. In 1974 Rep. Minshall retired and a Democrat, Ronald Mottl, was elected in C. D. 23. In 1980 Rep. Vanik retired and Democrat Dennis Eckart was elected from C. D. 22.

106. Plaintiff Robert L. Woodall ran against Louis Stokes as the candidate of the Republican party in 1980. Rep. Stokes received 88.2% of the vote and returned to

Congress.

107. The 1980 elections sent 13 Republicans and 10 Democrats to Congress from Ohio. The returns of the 1980 Census forced a reduction in Ohio's delegation from 23 to 21 members. As discussed above, two Republican Representatives retired from Congress to run for statewide office in 1982. No Democratic incumbent wanted to retire. Partisan control was divided in the Statehouse.

108. In a dress rehearsal for the 1992 gerrymander, the 1982 plan "paired" incumbents Eckart and Mottl in a newly drawn C. D. 19. That strangely shaped district was the least compact ever created in Ohio history. See Attachment 8, figure 8a. The right to represent it was won by Edward Feighan in a close 1982 win over Rep. Ron Mottl. However, the 1982 districting managed to preserve safe seats for Rep. Stokes, Ohio's only African-American Congressman, and Rep. Oakar, Ohio's only female Representative.

109. Plaintiff Robert L. Woodall ran against Rep. Stokes as the Republican candidate again in 1984. Rep. Stokes again returned to office with 82.3% of the vote.

110. When the results of the 1990 Census were in, Ohio lost another two Congressional seats. The now-long term incumbents in northeastern Ohio were Reps. Stokes, Oakar and Feighan. Rep. Stokes came out of the redistricting struggle in the best shape. Newspapers reported his successful effort to have his District, renumbered C.D. 11, drawn to include several downtown Cleveland office buildings that housed no voters but represented a golden opportunity for fund-raising. The gerrymander of this District clearly demonstrates another effect of a carefully planned gerry-mander: Not only votes and voters can be

allocated among the players, but financial deep pockets and purses as well. This further assures the election of favored candidates and defeat of the disfavored.

111. The rights of Plaintiff Woodall and all similarly situated voters and potential challengers in C.D. 21, now renumbered C.D. 11, have been violated, both by drawing that district's lines to include or exclude chosen voters and by drawing the lines to include or exclude specific office buildings useful only as fund-raising sources. The Defendants in this regard have violated:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the principie of governmental neutrality embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association rights protected by the 1st and 14th Amendments to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq.

COUNT XXII

112. Plaintiffs incorporate and adopt by reference the allegations set forth above in Paragraphs 1 through 111.

113. The same strategies and history detailed above also produced an unconstitutional gerrymander of C. D. 1 and C. D. 2 in the southwestern corner of Ohio, in the area of Hamilton County and the city of Cincinnati, to the harm of Plaintiff Steve Grote. Republicans were in control of the Ohio legislature during the Congressional redistrictings of 1951, 1965 and 1968. Hamilton County was, overall, "Republican" in character, although there was a substantial

concentration of Democratic voters in the inner-city area of Cincinnati. The Republicans employed the classic gerrymandering technique of "cracking" or "splitting" to assure that this inner-city concentration of Democrats was roughly equally divided between the (eastern) C. D. 1 and the (western) C. D. 2. Republican majorities were thus able to elect Republican Congressmen from both districts on a regular basis. (In the Johnson landslide of 1964, C. D. 1 elected Democrat John J. Gilligan, but in 1966 the situation returned to "normal".)

114. Power in the statehouse was divided in 1972, so the 1972 redistricting, as described above, was a bipartisan compromise to return the incumbents of both major political parties to power. All incumbent Ohio Representatives were re-elected in 1972, including the two Republicans holding C. D. 1 and C. D. 2.

115. In 1982 power was again divided at the Statehouse, so another bipartisan gerrymander was in order. Hamilton County remained divided between two districts but **the numbering was reversed** so that the western district, held by Democrat Thomas A. Luken, became C. D. 1 and the eastern became C. D. 2.

116. The boundary for Rep. Luken's district was moved eastward in 1982 to take in more territory but his new district included **all** of the district that had been re-electing him regularly since 1976, showing the importance of carryover for a gerrymander intended to protect an incumbent. Rep. Luken continued to be re-elected throughout the 1980's. In 1990 Rep. Thomas Luken retired and his son Charles ran for his seat, being only narrowly elected with 51.09% of the votes.

117. When the district's lines were redrawn by Am.

Sub. S. B. 292 in 1992 it was important to bolster freshman Rep. Charles Luken's Democratic margin if the Defendants were to insure re-election of this incumbent. The Defendants accomplished that goal by building a new district around the inner city. See Attachment 9. Its Democratic Index increased from 48.4 to **53.8**. After receiving his party's nomination in the regular 1992 Democratic primary, Rep. Luken withdrew from the race. A replacement candidate, David Mann, was nominated in a special Democratic primary election in August 1992, making Mr. Mann the unintended beneficiary of the district designed to re-elect Rep. Luken.

118. The 1992 general election for C.D. 1 pitted Plaintiff Republican candidate Steve Grote against David Mann. Mr. Mann prevailed with 51.2% of the vote, defeating Plaintiff Grote, who received 43.4%, and Libertarian candidate James Berns who received 5.4%. Plaintiff Grote came within seven percentage points of being the Congressman from C.D. 1.

119. The actions of the Defendants in this case in the purposeful gerrymander of C. D. 1 violated the rights of Plaintiff Steve Grote and all other voters in C.D. 1 as those rights are established and protected by:

a. Article I, Section 2 of the U. S. Constitution;

b. the Equal Protection Clause of the 14th Amendment to the U. S. Constitution;

c. the principle of governmental neutrality embodied in the 1st and 14th Amendments to the U. S. Constitution;

d. the free speech and free association clauses of the 1st Amendment as applied to the states by the 14th Amendment to the U. S. Constitution; and

e. the provisions of 42 U.S.C. Section 1983 et seq.

WHEREFORE, Plaintiffs respectfully pray:

(1) That a three-judge Court be promptly convened, as required by 28 U.S.C. Section 2284, and that this matter be set for an expeditious hearing by the Court;

(2) That the Court declare that Section 3521.01 of the Ohio Revised Code as revised by Am. Sub. S. B. 292 is now and prospectively will be in violation of the Constitution of the United States and is now and prospectively null and void and of no further force or effect insofar as it establishes Congressional districts for the State of Ohio;

(3) That the Court permanently restrain and enjoin the Defendants or any of them from ordering or conducting at any time in the future any electoral processes under O.R.C. Section 3521.01 as revised by Am. Sub. S. B. 292, from certifying the results of any election so held, or from taking any other steps, including the expenditure of any public funds, with respect to the election of Members of the United States House of Representatives from the State of Ohio, until there has been a further redistricting of Ohio Congressional districts in accordance with Constitutional requirements as approved or promulgated by the Court;

(4) That the Court mandate the Ohio legislature within a specified period of time to promulgate an impartial procedure to select and adopt a redistricting plan that will be consistent with all Constitutional requirements. Such a procedure might include as relevant criteria for judging among competing procedures or plans whether they (a) contain equal population in each of the nineteen Ohio congressional districts, to the maximum extent possible, (b) cross as few political boundaries as is reasonably feasible, (c) exhibit the maximum compactness consistent with meeting other criteria, and (d) be neutral as to the political affiliations

of any Ohioan or Ohioans and neutral to the promotion or disadvantage of any candidate or political group in Ohio. Additional criteria might be identified by either this Honorable Court or by the Ohio legislature. The plan resulting from such a procedure may consist of single-member districts, multi-member districts, or a combination of the two and could incorporate cumulative voting or transferable voting or propose other methodologies or their combination, without limit, in the effort to satisfy these goals;

(5) That the Court itself promulgate such a procedure if the Ohio legislature refuses or fails to do so in the time provided by the Court, in connection with which the Court's attention is respectfully directed to H.J.R. 2(Lawrence), currently pending in the Ohio House of Representatives and popularly known as the "Ohio Anti-Gerrymander Amendment", which has bipartisan sponsorship and which would afford a sound, workable, equitable and tested remedy that is immediately available. The Court is encouraged to allow, or to order the Ohio legislature to allow, the submission of proposed redistricting plans by any Ohioan who wishes to submit such a proposed plan. The Court is encouraged to choose, or to order the Ohio legislature to choose that plan which best meets the Constitutional criteria when judged by objective, neutral, independently verifiable methods, which methods are to be adopted by the Court or by the legislature;

(6) That the Court retain jurisdiction of this suit until such time as an acceptable redistricting plan has been selected and adopted by the Ohio legislature in accordance with the requirements of the U. S. Constitution;

(7) That the Court award Plaintiffs their costs and

reasonable attorneys' fees in connection herewith;

(8) And that the Court adopt and enter such other and further relief as may appear to the Court to be just, proper and reasonable in the premises.

Respectfully submitted by

/s/ David V Stivison

David V. Stivison, Esq.
Attorney for the Plaintiffs
870 North 30th Street
Philadelphia PA 19130-1104
(215) 763-2809
Ohio Att. Regis. # 0023693

OF COUNSEL:
Mr. John B. Anderson, Esq.
Distinguished Visiting
Professor of Law,
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale FL 33314
(305) 452-6100
Member D.C. and Ill. Bars

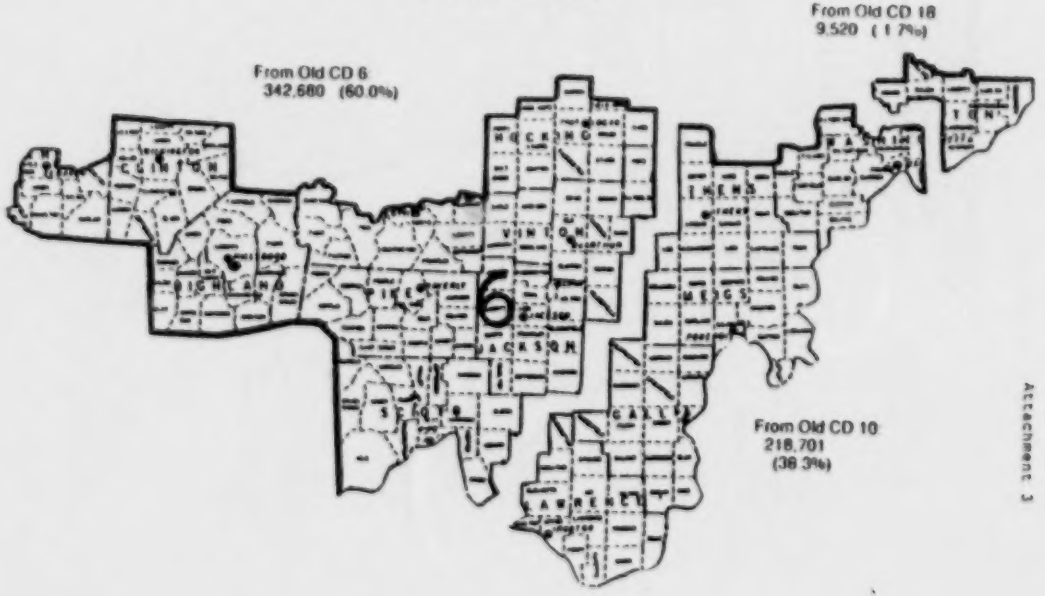
DATED: November 18, 1994

Attachment 1

Am. Sub. H. B. 160
1985 BIPARTISAN PLAN
Attachment 2
9
5
4
8
3
1
2
7
15
6
12
13
14
16
18
10
11
17
19
21

MAKEUP OF NEW CD 6

1990 Population 570,901



Attachment 3

CHECKMATE GERRYMANDER:
BREAKUP OF OLD CD 10

1990 Population: 526,475
(D.I. = "Democratic Index")

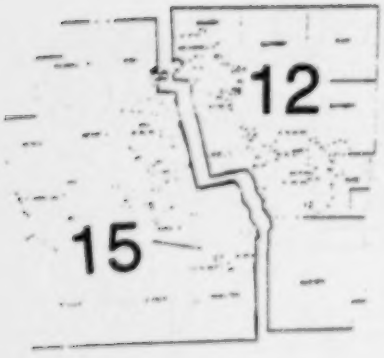


Figure 5a
FRANKLIN COUNTY
Plan of March 29, 1965
CD 12 DI = 45.4
CD 15 DI = 44.2

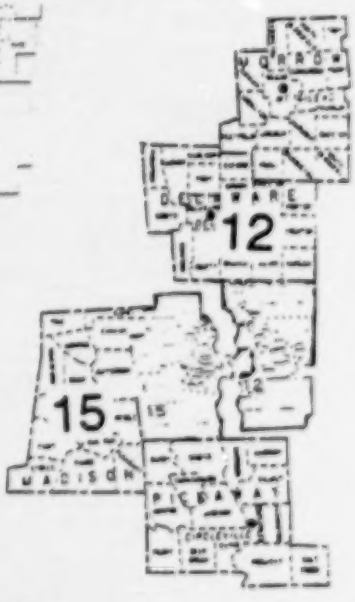


Figure 5b
CENTRAL OHIO
Plan of January 29, 1968
CD 12 DI = 45.5
CD 15 DI = 43.1

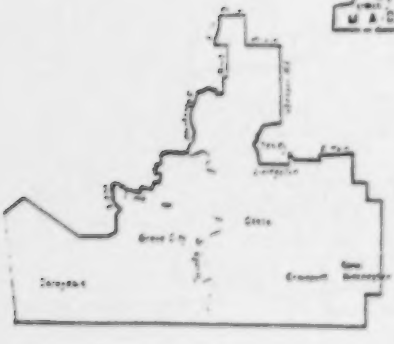


Figure 5c
"The Battleship"
CD 12 as proposed by
S.B. 283, 112th G.A. (1977)
Compactness Index = 33.9 ;
DI =

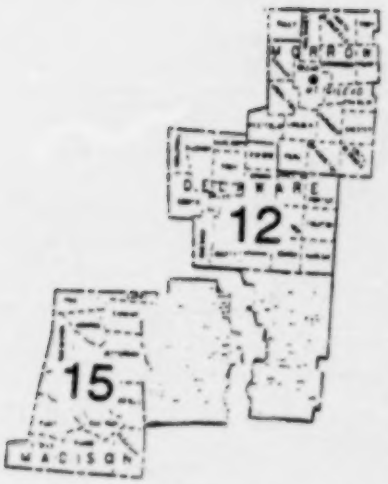


Figure 5d
CENTRAL OHIO
Plan of January 20, 1972
CD 12 DI = 44.5
CD 15 DI = 42.5

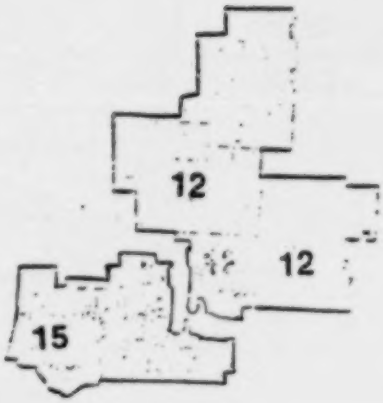


Figure 5e
CENTRAL OHIO
Plan of March 25, 1982
CD 12 DI = 45.5
CD 15 DI = 43.1

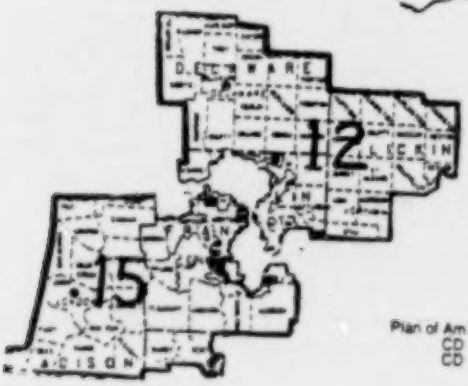


Figure 5f
Plan of Am. Sub. S.B. 292 (119th G.A.)
CD 12 DI = 47.8
CD 15 DI = 42.6

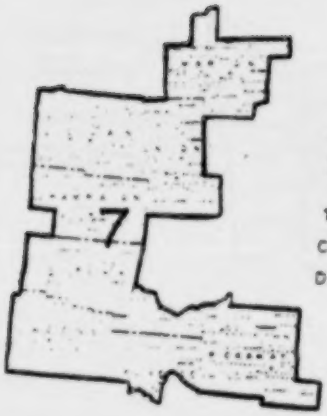


Figure 6a
CD 7
1982 Plan
C.I. = 21.8%
D.I. = 44.1%

Figure 6b
CD 7
1992 Plan
C.I. = 20.8%
D.I. = 41.9%

Attachment 7

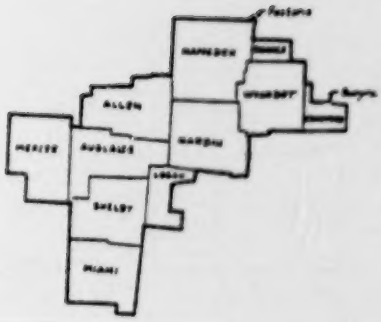


Figure 7a

CD 4

1972 Plan

CI = 32.0
DI = 44.1

Figure 7b

CD 4: 1982 Plan

CI = 20.4
DI = 41.9

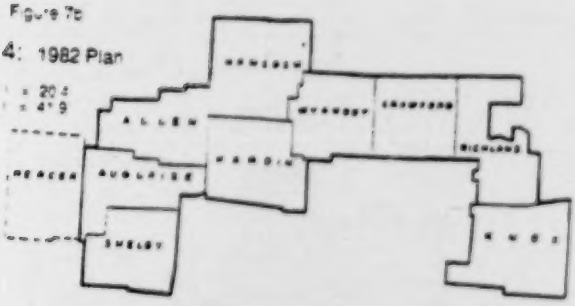


Figure 7c

CD 4

1992 Plan

CI = 28.7%
DI = 44.5%

Figure 8a

CD 19

1982/85 Plan

Compactness Index = 9.1
Democratic Index = 47.0%

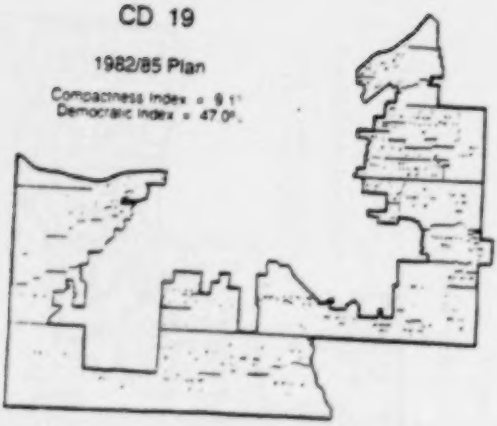


Figure 8b

CD 19

Plan of Am. Sub. S.B. 292

Compactness Index = 17.3%
Democratic Index = 49.8%

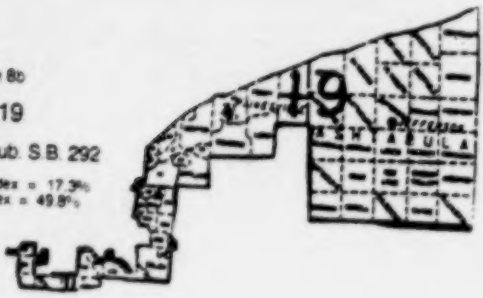
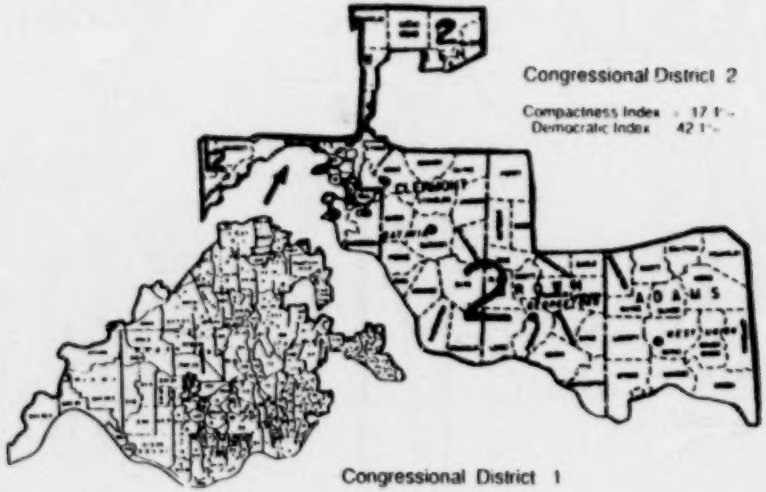


Figure 9

1992 PLAN CINCINNATI AREA



Attachment 9

Clarence E. Miller, et al.

v.

State of Ohio, et al.

APPENDIX: PART D

Plaintiffs' Answer to Defendants' Motion to Dismiss Complaint pursuant to Fed. R. Civ. P. 12(b)(6)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLARENCE E. MILLER, ET AL. :	
	: **CASE NO.**
	: **C2-94-1116**
Plaintiffs,	:
	: **JUDGE ALAN**
	: **NORRIS**
V.	: **JUDGE GEORGE**
	: **SMITH**
	: **JUDGE WALTER**
	: **RICE**
STATE OF OHIO, ET AL.,	:
	:
Defendants.	:

PLAINTIFFS' ANSWER TO
DEFENDANTS' MOTION TO DISMISS COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(B)(6)

Respectfully submitted,

/s/ David V Stivison

DAVID V. STIVISON (0023693)
Trial Attorney
870 North 30th Street
Philadelphia PA 19130-1104
(215) 763-2809

OF COUNSEL:

John B. Anderson, Esq.
Distinguished Visiting
Professor of Law,
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale FL 33314
(305) 452-6100
Member: D.C. and Ill. Bars

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 1

II. THE STANDARD FOR DISMISSAL 10

III. DEFENDANTS FAILED TO SATISFY THE CONSTITUTION'S "ONE PERSON, ONE VOTE" REQUIREMENT 12

IV. DEFENDANTS ADOPTED AN UNCONSTITUTIONAL COLLUSIVE BIPARTISAN GERRYMANDER 19

V. THE DEFENDANTS VIOLATED THE CONSTITUTIONAL PRINCIPLE OF GOVERNMENTAL NEUTRALITY BY ADOPTING THE INSTANT GERRYMANDER 27

VI. SUMMARY AND CONCLUSION 31

CERTIFICATE OF SERVICE 33

TABLE OF CITATIONS

U. S. CONSTITUTION AND AMENDMENTS

Preamble	7
Art. I, Section 2	7-9, 13, 14, 16, 20
First Amendment	6, 9, 11, 27-28
Fourteenth Amendment	6, 9, 11, 20, 30
Fifteenth Amendment	27

STATUTES (FOREIGN)

Halisbury's Statutes of England and Wales, 4th Ed. (1985)	30

RULES

Fed.R.Civ.P. 12(b)(6)	1, 5, 7, 10, 12, 15

CASES

Anne Arundel Co. v. State Admin. Board, 781 F.Supp. 394 (D.C.Md. 1991), aff'd. 504 U.S. ____, 112 S.Ct. 2269, 119 L.Ed.2d 197 (1992)	16-18, 25
The Bank of Columbia v. Okey, 4 Wheat. (17 U.S.) 235 (1819)	30

Barron v. Baltimore, 32 U.S. 247,
7 Pet. 247, 8 L.Ed. 672 (1833) 7-8

Chisholm v. Georgia, 2 Dallas (U.S.)
471, 1 L.Ed. 440 (1793) 7

Davis v. Bandemer, 478 U.S. 109, 106
S.Ct. 2797, 92 L.Ed.2d 85 (1986) 5, 6, 7, 11

Doe v. Johnson, 817 F.Supp. 1382
(W.D.Mich. 1993) 11

Epperson v. Arkansas, 393 U.S. 97,
89 S.Ct. 266, 21 L.Ed.2d 228 (1968) 29

Fowler v. Rhode Island, 345 U.S. 67,
73 S.Ct. 526, 97 L.Ed. 828 (1953) 28

Gaffney v. Cummings, 412 U.S. 735, 93
S.Ct. 2321, 37 L.Ed.2d 298 (1973) 3, 20-22

Gay Alliance of Students v. Matthews,
544 F.2d 162 (4th Cir. 1976) 28

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 29

Karcher v. Daggett, 462 U.S. 725, 103
S.Ct. 2653, 77 L.Ed.2d 133 (1983) 2, 11, 14-19, 28

Kirkpatrick v. Preisler, 394 U.S. 526,
89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) 14, 19, 22

M'Culloch v. Maryland, 17 U.S. 403,
4 Wheat. 403, 4 L.Ed. 579 (1819) 7

NAACP v. Button, 371 U.S. 415 (1963) 28-29

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 30

Newman v. Voinovich, 789 F.Supp. 1410 (S.D.Oh. 1992), aff'd. 986 F.2d 159 (6th Cir. 1993) 10

Niemotko v. Maryland, 340 U.S. 268, 95 L.Ed. 267 (1950)[should be 1951] 28

Police Dept. v. Mosely, 408 U.S. 92 (1972) 28

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 12, 14, 20, 26

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) 12

U. S. v. Cathcart, 1 Bond 556, 25 Fed. Cas. 344, Case No.14,756 (S.D.Ohio 1864) 8

U. S. v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) 8

Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969) 14, 19

Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) 13, 20, 26

West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628 (1943) 29

White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) 6

White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973) 2, 3, 14, 21, 23

Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) 29

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) 9

TREATISES

The Federalist Papers, Mentor book ed., 1961 27, 31-32

Magna Carta in America, David V. Stivison, Ed., Magna Carta Research Foundation, 1993 30

The Records of the Federal Convention of 1787, Max Farrand, c. 1966, Yale U. Press, Vol. 1 8, 23-25

PLAINTIFFS' ANSWER TO DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6).

I. SUMMARY OF ARGUMENT

The State of Ohio and the other Defendants in this case timely filed a Motion to dismiss the Complaint on the grounds that Plaintiffs have failed to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6)). Defendants limit their Motion to only two of the several causes of action brought by Plaintiffs (Motion, p. 4) and fail even in their argument related to those two issues.

If for no other reason, Plaintiffs have the right to proceed to trial in this case on the following three grounds:

1. Defendants allege that "the Ohio General Assembly made a good-faith effort to achieve absolute mathematical equality." (Motion, p. 3) That is a lie, and Plaintiffs expect to be able to prove at trial that it is a lie. Plaintiffs state at Paragraph 27 of their Complaint, p. 12, that:

> At various times, several differing plans were presented to members of the Ohio legislature to provide for the redistricting of the state into nineteen districts. Ten separate plans drawn impartially, with no regard for any predetermined political result, were submitted to legislative committees by the Center for Research Into Governmental Processes, Inc., an Ohio non-profit research and education organization formed in 1989. Four of these ten plans provided for absolute numerical equality in population for all nineteen districts. (Emphasis added)

If that allegation is true, as Plaintiffs plan to prove, the Ohio General Assembly did not act in good faith in rejecting all these alternative plans. The very existence of these plans has a Constitutional dimension for it shows that it was possible and practicable to construct a redistricting scheme with lower population deviations among the districts than the plan ultimately adopted. White v. Weiser, 412 U.S. 783, 790, f.n. 9, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).

2. Karcher v. Daggett, 462 U.S. 725, 730-731, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) requires that, once Plaintiffs prove that population variances in the districting plan could have been avoided by a good faith effort to create districts which have equal populations, the State must then provide justifications for each variance. The State of Ohio advances preventing contests between most incumbents as an acceptable justification (Motion, pp. 24-28). When this case gets to the remedy stage, and all parties are discussing what standards this Court should set for the neutral districting procedure that will be required of the Ohio Legislature, the legitimacy of this goal will be addressed. However, at this stage, even if preventing incumbent contests is an acceptable justification for minor variations in population, that justification does not avail the Defendants here. Their Motion carefully states that Ohio's districting plan was adopted to protect "most of the incumbents from having to run against each other" (Motion, p. 28)(emphasis added). Protecting "most" incumbents is not an acceptable justification. Defendants may as well now admit Plaintiffs' allegations that they conspired to help their friends and target others for defeat.

After the results of the 1990 Census were received Ohio qualified to have nineteen Representatives. At that time

Ohio had nineteen incumbent Representatives who wished to continue serving. Clearly, if preventing incumbent contests had been Defendants' purpose in redistricting, Defendants could have "protected" all nineteen incumbents. Defendants did not do that. As Plaintiffs allege and expect to be able to prove, Defendants specifically targeted incumbent Representative Clarence E. Miller for defeat. The plan adopted by the State of Ohio, through the actions of Defendants, pitted two incumbent Representatives against each other in two separate contests (Representatives Miller and Hobson in one race and Representatives Feighan and Oakar in another). This would not have occurred if Defendants had been serious about avoiding contests between incumbents. Where the population variances in the State's plan were not necessary to meet the stated goal of preventing incumbent contests, this Court should reject the plan as unconstitutional. White v. Weiser, 412 U.S. at 792.

Whether Defendants made a "good faith" effort to achieve equal population in each district and whether, in an admittedly unequal population redistricting, Defendants had any justification for the lack of equality, are questions of fact on which Plaintiffs and Defendants take diametrically opposed positions. If Plaintiffs prove lack of good faith and lack of a consistently applied justification, Plaintiffs win this case and Ohio will have to be redistricted.

3. Defendants further state to the Court that "Finally, the relief Plaintiffs seek -- "politically neutral" district lines -- is neither preferable to the current method for drawing lines or possible." (Motion, p. 3) Defendants are wrong on both counts. Plaintiffs expect to show that development of impartial districting procedures since Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), have

rendered that decision obsolete and it should be limited to its own facts as they existed at that time. Plaintiffs also expect to prove that impartial districting is both possible and preferable from a Constitutional point of view to the collusive bipartisan political gerrymander created by Defendants. Plaintiffs referenced the Ohio Anti-Gerrymander Amendment (H.J.R. 2) as one appropriate response and approach (Complaint, p. 41). Plaintiffs append hereto the text of that Amendment and commentary explaining it (Attachment A). Again, because this point is a contested factual issue bearing on a potentially dispositive issue, Plaintiffs should be allowed to present their proof and let the Court decide whether the remedy sought is possible or preferable to the current practice. .

Defendants support their position on this point by fundamentally mischaracterizing the remedy Plaintiffs ask. Defendants state "Plaintiffs, throughout their Complaint, repeat the remedy they seek: to have this court reject Ohio's bipartisan districting plan and craft a new plan which is politically neutral." (Motion, p. 28)(emphasis added) Defendants provide no citation for this statement, because no citation can be provided: Plaintiffs have not asked this Court to draft a new districting plan for Ohio. Plaintiffs' proposed remedy was clearly stated:

> That the Court mandate the Ohio legislature within a specified period of time to promulgate an impartial **procedure** to select and adopt a redistricting plan that will be consistent with all Constitutional requirements.

(Complaint, pp. 40-41)(emphasis added). Plaintiffs want Ohio to use an impartial procedure to adopt the districting

plan that best meets Constitutional requirements. Plaintiffs have no competing plan to offer the Court.

Defendants are correct that "The political results of every districting plan can be predicted." (Motion, p. 29) and that "Using criteria which are allegedly neutral or nonpolitical will not prevent the districting plan from having political results." (Id.) Of course that is true. The fact is that every districting plan will help some candidates and harm others, whether they be incumbents or challengers; Black or white; Hispanic or Anglo; Republicans, Democrats, Libertarians or others. That is not the point of this Complaint. The point of this Complaint is that such help or harm should arise out of the impartial application of impartial criteria through an impartial procedure, not through a group of political bosses meeting in a back room and picking the winners and losers. As stated in the Complaint, "The purpose of this Complaint is to take the State of Ohio out of the business of rigging elections." (Complaint, Paragraph 16, p. 7) Plaintiffs ask the Court to order the Ohio legislature to adopt an impartial, consistent and nondiscriminatory procedure and then let the chips fall where they may.

Because of these three contested and potentially dispositive questions of fact alone, it is not appropriate to cut off this case under a Rule 12(b)(6) Motion. Plaintiffs have alleged sufficient facts which, if proved, will require the Court to order Ohio to redistrict.

4. Further, Defendants misapply the ruling in Davis v. Bandemer, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) to the facts of this case. As Defendants correctly state, "In **Bandemer** the Court created the test for establishing whether a partisan political gerrymander (i.e., a gerrymander designed to benefit only one of the major

parties) violates the Constitution." (Motion, p. 10) However, this is not such a case. Plaintiffs here allege a bi-partisan gerrymander, which is an entirely different matter, falling outside the Bandemer test as it applies to Republican or Democratic Plaintiffs. Although Democratic challengers in those districts targeted by the Defendants to have a Republican Representative and Republican challengers in those districts targeted to return a Democratic Representative were disadvantaged because of their political affiliation - and Congressman Miller, as alleged in the Complaint, would not have been targeted for defeat had he been a Democrat, these are violations of the Plaintiffs' personal and individual Constitutional rights, the U. S. Supreme Court's "paramount concern" in similar cases. White v. Regester, 412 U.S. 755, 781, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)(Dissent by Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall)

Unlike partisan political gerrymander cases, this Complaint has not been filed on behalf of one major party to stop gerrymandering by the other major party, and the vote dilution tests used in Bandemer are simply irrelevant to this case. Pages 10 through 18 of Defendants' Motion can simply be disregarded or stricken because that section deals exclusively with application of the Bandemer criteria to this case. **This is not a Bandemer claim.**

Plaintiff Kukor raises claims under the free speech and free association guarantees of the First Amendment; the neutrality principle; and Section 1983 (Complaint, pars. 79, 81 and 83, pp. 28-29). Plaintiff The Libertarian Party of Ohio raises similar claims plus a claim under the Equal Protection clause of the 14th Amendment and under the right to direct election of Article I, Section 2 (Pars. 86, 88, 90, 92

and 94, pp. 30-31). None of these claims are subject to a Bandemer analysis.

5. Defendants do not address several arguments made by Plaintiffs, which, if proven at trial, will be dispositive and will lead to the remedies Plaintiffs' seek. If for no other reason, Defendants' Motion is fatally defective for ignoring these allegations. Interpreting them in a light most favorable to Plaintiffs, they provide independent and sufficient basis for Plaintiffs' Complaint and make it inappropriate to dismiss the Complaint at this stage under a Rule 12(b)(6) Motion.

Count II (Complaint, pp. 14-15) alleges that the collusive bipartisan gerrymander adopted by the Ohio legislature violates the requirement for direct election of Representatives found in Article I, Section 2 of the Constitution. This claim is consistent with all that our founding fathers hoped for the Constitution and is sufficient alone to justify a new impartial redistricting.

Even the Preamble to the Constitution starts with a recognition of this truth: WE THE PEOPLE ordain and establish the Constitution and all the subsidiary parts needed to make it work - not the states nor the major political parties but the People directly. The People established a constitution to bind the state governments, not the other way around. Chisholm v. Georgia, 2 Dallas (U.S.) 471, 1 L.Ed. 440, 462 (1793). The Constitution emanated from the People and was not the act of the sovereign and independent states. M'Culloch v. Maryland, 17 U.S. 403, 4 Wheat. 403, 4 L.Ed. 579 (1819). It was ordained and established by the People of the United States for themselves and for their own government, not for the government of the individual states. Barron v. Baltimore, 32 U.S. 247, 7 Pet. 247, 8 L.Ed. 672

(1833). And this direct connection between the People and their government cannot be abrogated by anything a state may do - even including secession. U. S. v. Cathcart, 1 Bond 556, 25 Fed. Cas. 344, Case No. 14,756 (S.D.Ohio 1864). The state may no more dictate to whom its citizens pledge allegiance than it can dictate for whom they may vote.

Extensive debate in the Constitutional Convention documents and emphasizes the importance placed by the delegates on the direct election of Representatives by the People. (See, e.g., The Records of the Federal Convention of 1787, Max Farrand, c. 1966, Yale U. Press, vol. 1, pp. 20, 48-51, 60-61, 118, 130-144.)

The right secured by Article I, Section 2, "since the Constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states." U. S. v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

Plaintiffs should be given the opportunity to develop and present to the Court their argument that the clear language of Article I, Section 2, forbids the Defendants from collectively stepping between the voters and the candidates who seek to represent them, and attempting to rig the election of Defendants' friends and defeat of all others. If Plaintiffs show this has happened, it violates rights vouchsafed by the Constitution and requires that Ohio be redistricted in an impartial manner. For this reason, if for no other, the Defendants' Motion should be denied.

6. Defendants also do not address Plaintiffs' charges that Ohio's collusive gerrymander conflicts with the Constitutional command of governmental neutrality in this, as in many other areas. Just as the government may not

favor one speaker among many or one religion among many, it cannot manipulate the electoral system to favor only those chosen by the Defendants to be Ohio's Representatives. "[T]he Ohio system does not merely favor a 'two-party system'; it favors two particular parties - the Republicans and the Democrats - and in effect tends to give them a complete monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32, 89 S.Ct. 5, 21 L.Ed.2d. 24 (1968) (emphasis added). Simply put, the First and Fourteenth Amendments to the U. S. Constitution require a level playing field, in which all persons, parties and organizations have equal access and a chance at success not subject to state interference. None of the Plaintiffs in this case have received that level playing field.

Plaintiffs allege that the State of Ohio and other Defendants violated the neutrality principle enshrined in our Constitution (Complaint, par. 48, pp. 18-19; par. 62(c), p. 23; par. 65(c), pp. 24-25; par. 75, p. 27; par. 81, pp. 28-29; par. 88, p. 30; par. 97(c), p. 32; par. 100(c), p. 34; par. 111(c), p. 37; and par. 119(c), p. 39). Defendants in their Motion to Dismiss do not dispute that allegation. If Plaintiffs establish at trial that their allegations are correct, they will have proven their right to the remedy they seek. Because of this, if nothing more, Defendants' Motion ought not to be granted.

For Defendants to prevail, they must show that each Count of Plaintiffs' Complaint is inadequate under any set of facts to give Plaintiffs or any of them the right to redress. To the contrary, Defendants have failed to present this Court

any reason to grant their Motion to Dismiss for any of the bases they claimed. Complainants therefore ask this Honorable Court to DENY Defendants' Motion and allow this case to go to trial where arguments will be developed and a factual record assembled to put this case fairly before the Court for a decision on the merits.

II. THE STANDARD FOR DISMISSAL

The standard to be applied in deciding whether to grant or deny this Motion to Dismiss has been recently and succinctly stated by this Court:

> A district court may not dismiss a claim under Rule 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts to support a claim which would entitle him to relief. ... In determining whether the facts presented in a complaint support a claim upon which relief can be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. ... The essence of the court's inquiry is to determine whether the allegations contained in the complaint satisfy the mandate of the Federal Rules that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D.Ohio 1992)(case citations omitted), aff'd. 986 F.2d 159 (6th Cir. 1993)(Judges are "policymakers" whose political affiliations may properly be considered in appointments process). It is sufficient for a Complaint to "in essence set forth enough

information to outline the elements of a claim or to permit inference to be drawn that these elements exist." Doe v .Johnson, 817 F.Supp. 1382, 1385 (W.D.Mich. 1993)(emphasis added). What is an outline of the elements alleged by these Plaintiffs?

1. That in the redistricting challenged here, Ohio did not adopt absolutely equally populated districts although it had been presented with the opportunity to do so;

2. Ohio's claimed justification for the variance - avoiding incumbent contests - does not avail even if that is a justifiable reason, since not all incumbent contests were avoided when they could have been. Picking and choosing shows bad faith. Thus the requirements of Karcher v. Daggett are not met. Because this is a case alleging a collusive bipartisan gerrymander, the Bandemer analysis does not apply;

3. That the remedy sought by Plaintiffs is both possible and appropriate, a clearly disputed issue of fact;

4. That, since the Defendants address only in passing Plaintiffs' allegation that the redistricting violated the guarantee of direct election of Representatives under Article I, Section 2 of the U. S. Constitution, Plaintiffs should be allowed to put on their proof of that claim;

5. That, since the Defendants did not even address Plaintiffs' allegation that this redistricting violated the principle of governmental neutrality especially applicable to religion, speech and political activities as embodied in the First and Fourteenth Amendments to the U. S. Constitution, Plaintiffs should be allowed to put on their proof of that claim.

Plaintiffs address several of these issues in more detail in the discussion following. If the Court believes that

any one of the above allegations is capable of proof and that such proof may provide the basis to grant relief, then the requirements of Rule 12(b)(6) will have been met and the Defendants' Motion should be denied. As then-Chief Justice Burger explained, speaking for a unanimous Court,

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, 96 (1974)(emphasis added). Plaintiffs here ask the Court to grant no more than the complainants in that case received - that they are entitled to have their claims judicially resolved. Id., at 105.

III. DEFENDANTS FAILED TO SATISFY THE CONSTITUTION'S "ONE PERSON, ONE VOTE" REQUIREMENT.

Failures of some state legislatures to reapportion since 1900 and massive migrations from region to region during World War II and the 1950's set the stage for the Constitutional review of voting disparities after the 1960 Census. Courts then often faced inequalities that cried out for redress on their face. In the Alabama legislature, for example, to read that "Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House" immediately invites correction. Reynolds v. Sims, 377 U.S. 533, 545, 84 S.Ct. 1362, 12 L.Ed.2d 506

(1964).

Fairness demands the equality of each voter's voice in choosing Congressional representatives as well as state legislators. "[C]onstrued in its historical context, the command of Art. I, [Section] 2, that Representatives be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sanders, 376 U.S. 1, 8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (emphasis added) The Court continued:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.

Id., at 14. This is the standard Plaintiffs allege was violated in the instant case. It was violated in two ways. The easiest to state is that some districts have more people in them than others, not many more, but some more.

This standard is also violated when people are grouped into districts with the intention and for the purpose of electing or defeating specific candidates for office. Plaintiffs allege that this violation also occurred in drawing Ohio's current Congressional boundaries. What Mr. Chief Justice Warren stated for the Court in relation to state legislatures certainly here applies to Representatives as well: "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state

legislature. Modern and viable state government needs, and the Constitution demands, no less." Reynolds v. Sims, 377 U.S. 533, 565, 84 S.Ct. 1362, 12 L.Ed.2d. 506, 529 (1964) (emphasis added) Manipulating district boundaries to help a Republican candidate in one district, a Democrat in another, or to assign office buildings with no resident voters but tenants who make lucrative political donors to favorite incumbents destroys the "equally effective voice" guaranteed to each individual by the Constitution.

Later Supreme Court decisions concentrated on the first type of inequality: pure population equality became the touchstone in Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) (requiring states to make a "good-faith effort to achieve precise mathematical equality." [emphasis added]); Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969); and White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).

The most recent case from that line is Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). That case involved a redistricting plan for New Jersey, where:

(1) "Each district did not have the same population." Id., at 728.

(2) "The legislature had before it other plans with appreciably smaller population deviations between the largest and smallest districts." Id. Plaintiffs have alleged that the same is true in this case, except that some of the plans before the Ohio legislature had zero population variance, which is the standard adopted by the Karcher decision. "As between two standards - equality or something less than equality - only the former reflects the aspirations of Art. I, [Section] 2." Id., at 732.

Mr. Justice Brennan's opinion for the Court in Karcher, supra, reviewed the standards adopted by the cases cited above and summarized:

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld.
>
> If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.
>
> ....
>
> Adopting any standard other than population equality ... would subtly erode the Constitution's ideal of equal representation.

Id., at 730-731. Plaintiffs have alleged with particularity that the Defendants could have reduced or eliminated population variances by a good-faith effort to draw districts of equal population. For purposes of analyzing a Rule 12(b)(6) Motion, Plaintiffs must be assumed to be able to prove what they have alleged.

The State must then bear the burden of justifying any variance. The State has not at this stage introduced any evidence on this question, so the Defendants cannot prevail

on this point at this time. This case must go to trial if for no other reason than to allow the State to try to meet its burden of proof on this issue.

The State has, however, raised one alleged justification: avoiding incumbent contests. As stated above, with nineteen incumbents wishing to return to Congress and nineteen Congressional seats to be filled, the Defendants could have drawn Ohio's districts to meet that goal, assuming arguendo that it is a valid goal. Since the redistricting adopted by Defendants pitted two pairs of incumbents against each other, the State cannot rely on avoiding incumbent contests as a defense.

Defendants rely on Anne Arundel County v. State Admin. Board, 781 F.Supp. 394 (D.Md. 1991), aff'd. 504 U.S. ____, 112 S.Ct. 2269, 119 L.Ed.2d 197 (1992)(Motion p. 27-28) but that case is totally irrelevant to the instant Complaint. First, it was not a bipartisan gerrymander challenge. Indeed, the only common trait the Plaintiffs seem to have had was that they were all Anne Arundel County voters protesting the division of their county among four districts (Id., at 399, 400). The Court specifically noted that "this instance is not a case of political gerrymandering as seen in **Davis**." (Id., at 399). Second, the Constitutional theory was different. From the brief summary of their theory found at p. 395 they appear to have presented a claim of "vote dilution" and deprivation of the right to effectively participate in the political process, without Plaintiffs' claims in the instant case going to the Karcher requirements, the right of direct election in Art. I, Sec. 2, the neutrality principle, or other claims in the instant case. Finally, the remedies considered were ludicrously inadequate: That "a federal court, in a sort of judicial receivership, will ultimately

conduct redistricting" (Id., at 399) or that "the "people" of the State of Maryland .... be heard individually via a statewide town meeting of the whole." (Id., at 400). Even the dissent could only vaguely propose "geological structures and long-standing boundaries, including state municipal and county subdivision boundaries" as "neutral criteria" (Id., at 407). This contrasts with Plaintiffs' plea here for an impartial procedure to be adopted by the Ohio legislature for future planning. The inadequacies in the Anne Arundel remedies may reflect the fact that the suit was filed shortly after October 23, 1991, and the decision of the three-judge panel was rendered two months later, on December 23, 1991 (Id., at 395, 394). Even with all these inadequacies, however, the decision in Anne Arundel to allow that districting plan to stand against that particular challenge (without prejudice to other suits against the same plan, see pp. 397-398), was only agreed to by the two District Court representatives on the panel, eliciting a well-reasoned and eloquent dissent from Circuit Judge Niemeyer (pp. 401-410), with an excellent analysis of the debates in the Federal Convention supporting direct election and limiting the role of states to mere ministerial duties. Inter alia he concluded that:

> It cannot legitimately be disputed, therefore, that under the structure of the Constitution, the House of Representatives is established to provide direct and equal representation of the people without any interfering agency on the part of the states. The states' role is limited to establishing the time, place and manner of elections (subject to federal supervision) and to providing the people with districts that assure direct and equal representation. The criteria to be applied by the states in

> discharging this responsibility can be based only on policies which secure the direct and equal representation **of the people** - not of legislators, interest groups, or perceived interests of the state as a whole - in order to assure representation without vote dilution for a particular interest. Accordingly, it must be conceded that the right of the people to elect directly their Representatives to the larger House of the federal legislature means nothing if the COnstitution does not forbid the states from manipulating the boundaries of congressional districts in attempts to influence the outcome of the people's congressional elections.

Id., p. 406 (underlining added)

Whatever defense the State of Ohio eventually tries to make for the population disparity in its current districts, it will need to be made at trial, and there:

The State must ... show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on

[1] the size of the deviations,

[2] the importance of the State's interests;

[3] the consistency with which the plan as a whole reflects those interests;

[4] and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

By necessity, whether deviations are justified requires case-by-case attention to these factors.

Karcher, supra, at 741 (numbers and spacing added to highlight four-step analysis). For these reasons, this case needs to go to trial to allow the Court to carry out the analysis required by these cases.

IV. DEFENDANTS ADOPTED AN UNCONSTITUTIONAL COLLUSIVE BIPARTISAN GERRYMANDER.

Despite the clear requirement for a trial to resolve the Karcher claims raised by Plaintiffs, however, that is not the end of this case. If it were, the Court could simply order the legislature to go back and pass a new districting plan with exactly equal population. In today's world, that would merely replace one gerrymander with another. As Mr. Justice Harlan recognized,

> The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of issues.

Dissent of J. Harlan joined by J. Stewart in Kirkpatrick v. Preisler, 394 U.S. 526, 551, 89 S.Ct. 1225, 22 L.Ed.2d 519 and Wells v. Rockefeller, 394 U.S. 542, 22 L.Ed.2d 535 (1969).

Plaintiffs claim that the Defendants' actions, in addition to all other claims raised in the Complaint - violations of free speech, free association, "one person, one vote", Section 1983 conspiracy - violate the right of these Plaintiffs and each other Ohio voter and each other

Congressional candidate to have Ohio's districts drawn in an impartial manner using an impartial procedure.

Defendants claim that there is no such right, relying on Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (Motion, p. 7 et seq.) That case is inapposite here because it charged that the apportionment plan adopted for Connecticut's state legislature was "a political gerrymander" that contained "a built-in bias in favor of the Republican Party." Id., at 739. Gaffney alleged a partisan gerrymander. The "Gaffney" in the case's caption was the Chairman of the State Republican Party, appearing in support of the plan. Again, the instant case involves a bipartisan collusive gerrymander and is unique in American jurisprudential history because of that fact.

Further, Gaffney involved the apportionment of a state legislature, which is not the case here. Justice White in penning the Gaffney decision specifically stated:

> We concluded that there are fundamental differences between congressional districting under Art. I and the Wesberry line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and Reynolds v Sims [citation omitted] and its progeny.

Id., at 741-742 (emphasis added), where he also noted that "the dichotomy between the two lines of cases has consistently been maintained." Id. One reason for the dichotomy is that state legislatures typically contain many more members than a state's Congressional delegation, so that achieving absolute equality is much more frequently impossible. We must also keep in mind that "congressional districts are not so intertwined and freighted with strictly

local interests as are state legislative districts". White v. Weiser, 412 U.S., at 793. Practices which may be acceptable to try to "provide a rough sort of proportional representation in the legislative halls of the State" (Gaffney, 412 U.S. at 754, emphasis added) are not applicable in choosing members of Congress, which includes representatives from all fifty states who must act together to shape the course for our entire nation.

Even if Gaffney were controlling here, there would still need to be trial in this case as there was in Gaffney itself to prepare a factual record on which this Court could rule. (The Gaffney panel "heard testimony in March 1972", Id., at 739.)

However, Plaintiffs wish to make it clear that they consider the reasoning in Gaffney to be limited to the facts before the Court in that case. That analysis has been superceded by the development of impartial districting procedures since Gaffney was decided over twenty years ago. As part of the proof that the remedy sought by Plaintiffs of an impartial districting procedure is both possible and Constitutionally preferable to a collusive gerrymander, Plaintiffs expect to introduce expert evidence that the State will have available several methods from which to choose to assure a fair and even-handed districting process.

This evidence will address one of the premises underlying the Gaffney decision that is no longer true, namely that "extirpating politics" from the "essentially political processes of the sovereign states" is an "impossible task". Id., at 754. Plaintiffs intend to show that there is a way to do that, if there is a will to do so.

A second superceded premise underlying Gaffney is the assumption that the Court has only two alternatives if it

wishes to give relief from gerrymanders: (1) to hold elections at large, or (2) to turn the task of drawing districts over to supposedly disinterested technicians. Id., at 753. The opinion called an impartial procedure a "politically mindless" approach, and predicted that it could produce "whether intended or not, the most grossly gerrymandered results." Id. This is not a use of the term "gerrymander" which should be encouraged: An "unintended gerrymander" is an oxymoron. Gerrymandering requires intention. (Justice Fortas defined it as "the deliberate and arbitrary dis- tortion of district boundaries and populations for partisan or personal political purposes." Kirkpatrick v. Preisler, 394 U.S. 526, 538, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969)(Concurring opinion)).

The most scrupulously impartial districting procedure will of course have political effects, and may well "determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator." Id. It is not these results which are Constitutionally objectionable but rather the way in which they come about. If they arise from the impartial application of an impartial procedure, there is no basis of complaint. However, if they arise as a result of animus and calculation, they make the State a player in the game instead of a referee, which is the State's proper role.

The Court in Gaffney accepted the inevitability of political manipulation, stating "The reality is that districting inevitably has and is intended to have substantial political consequences" (Id., emphasis added). This intentional tilt need no longer haunt American politics.

Plaintiffs envision an open and impartial procedure which will allow any person or group who wishes to submit a proposal to do so - the Republican Party, the Democratic Party, the Libertarian or other minor party, independent voters, college computer classes, political consultants - anyone with the time and interest to create a proposal that meets the criteria established by the legislature within the parameters of the Constitution. All submitted plans would then be judged and ranked based on their compatibility with those criteria and the one that scores best will be identified. Any person carrying out the same analysis using the same criteria on the same proposals should get the same answer. That plan would then be adopted. This participatory and impartial process would assure that any help or harm to a particular party or candidate from the way district lines are drawn will not arise from ill-will or intent but rather from the luck of the draw.

This will meet the goal, elusive until recent years, of providing a remedial process in the reapportionment area that is "a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative government." White v. Weiser, 412 U.S. at 799 (Concurrence of Mr. Justice Powell, joined by Chief Justice Burger and Mr. Justice Rehnquist).

This goal articulated by Mr. Justice Powell also conforms to the original intent of the Framers of our Constitution. A reader of The Records of the Federal Convention of 1787, edited by Max Farrand, Yale U. Press, 1966 ed., will find that the first substantive business conducted by the Federal convention was debate and voting on fifteen resolutions - collectively referred to as the

"Virginia Plan" - offered by delegate Edmund Randolph on Tuesday, May 29, 1787. The first clause of the fourth resolution was "Resolved that the members of the first branch of the national legislature ought to be elected by the people of the several states every for the term of ." (p. 20) During debate on this resolution two days later, six delegates spoke: delegates Mason, Wilson and Madison in support, and delegates Pinckney, Gerry (twice) and Sherman in opposition. The only alternative proposed to having "the people" choose the members of that house was to have the state legislatures do it. (pp. 48-60) No opponent of the resolution offered the argument that the state legislatures could act as the surrogates of the people because they were the "voice of the people". The issue was only whether this prerogative would be exercised by the people or the state legislatures.

Delegate Gerry, in particular, did not want to entrust this responsibility to the people. He said:

> The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots. ... [T]hey are daily misled into the most baneful measures and opinions.

(p. 48)(emphasis added) Mr. Gerry "had been taught by experience the danger of the levilling spirit." (Id.) In this he agreed with delegate Sherman: The people "should have as little to do as may be about the Government. They want information and are constantly liable to be misled." (Id.)

Mr. Wilson on the other side reposed much more faith in the people. "No government could long subsist without the confidence of the people. In a republican Government this confidence was peculiarly essential." (p. 49)

Election of the lower chamber should come directly from the people because "All interference ["competition" crossed out] between the general and local Governments should be obviated as much as possible." (Id.)

Gerry and Sherman were unsuccessful and Mr. Wilson's view enjoyed a majority: Six states supported the resolution, two opposed and two delegations were split. (pp. 46, 50)

A proposal that "the second, (or senatorial) branch of the National Legislature [ought to] be chosen by the first branch out of persons nominated by the State Legislatures." (p. 51) went down to defeat.

Resolution 4 was taken up again on June 6th, with Delegate Pinckney moving to replace election by the "people" with choice by the state legislatures. (p. 130) Many of the same arguments were raised, Mr. Wilson arguing that "The Legislature ought to be the most exact transcript of the whole society" and Mr. Sherman finding that "The right of participating in the National Govt. would be sufficiently secured to the people by their election of the State Legislatures." (pp. 132-133) When the vote was taken, direct election by the people was adopted by eight votes (Mass., N.Y., Pa., Del., Md., Va., N. Caro. and Ga.) to three (Conn., N.J. and S. Caro.).

Mr. Sherman's losing logic has been recently echoed by a District Judge in Maryland, who asserted (without citation) that "this federal court must keep in mind that the voice of the people of Maryland is most directly heard through the General Assembly of Maryland." Anne Arundel County v. State Admin. Bd., 781 F.Supp. 394, 399-400 (D.Md. 1991), aff'd. 504 U.S. ____, 112 S.Ct. 2269, 119 L.Ed.2d 197 (1992).

The original intent of the Founding Fathers was to eliminate the state legislatures from choosing members of the House of Representatives. That is the goal this suit seeks to further. When the state legislature can manipulate the boundaries of Congressional districts to intentionally help any candidate or harm any candidate, it subverts the expressed intention of the Founders of this country.

It is instructive that the prideful disdain of the individual voter expressed by Delegate Gerry is found also in the attitude supporting his namesake ploy, the "Gerrymander".

When the sixteen individuals named as Defendants in this suit can accomplish an open intentional Gerrymander, their power is multiplied many thousandfold over that of their ten million fellow Ohioans. Their votes on the redistricting plan are worth multiples of the votes of any other person cast in a Congressional election and their influence is far more lopsided than the voting inequities found in Reynolds v. Sims, Wesberry v. Sanders or any other "one person, one vote" case that has ever come before this or any Court.

The framers of our national government even forbad the states from setting separate qualifications for those voting for Congressional candidates by requiring that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature" (Art. I, Sec. 2). Only the impartial districting procedure championed by Rep. Miller and the other Plaintiffs in this case can achieve the purity of government envisioned by its earliest apologists:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican

> government. ... To have submitted it to the legislative discretion of the States would have been improper ... for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.

The Federalist Papers, No. 52 [Madison], Mentor book ed., 1961, p. 326 (emphasis added). Only the establishment of impartial districting procedures will make the selection of Representatives "dependent upon the people alone".

The Plaintiffs believe they carry the mantle of their spiritual forbearers while the Defendants repeat the tired, elitist rhetoric rejected over two centuries ago. This Court must choose between them. The Court cannot have a full development of these issues through this Motion and Answer alone. A full trial followed by complete briefing alone will provide this Court the aid and information it needs to make its choice.

V. THE DEFENDANTS VIOLATED THE CONSTITUTIONAL PRINCIPLE OF GOVERNMENTAL NEUTRALITY BY ADOPTING THE INSTANT GERRYMANDER.

"The Equal Protection Clause requires every State to govern impartially." So declared Mr. Justice Stevens in his concurring opinion in Karcher v. Daggett, 462 U.S. 725, 748 (1983). Not just the Equal Protection Clause, but the First Amendment right of free speech, the First Amendment right of free association and the Fifteenth Amendment require the same.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. v. Mosely, 408 U.S. 92, 95 (1972) Strict governmental neutrality in all matters of speech has been enforced by so many decisions and applauded by so many commentators that no one would now question it. As one judge explained:

> It is of no moment, in First Amendment jurisprudence, that some ideas advocated by an association may to some or most of us be abhorrent, even sickening. The stifling of advocacy is even more abhorrent, even more sickening. It rings the death knell of a free society. Once used to stifle "the thought that we hate", in Holmes' phrase, it can stifle ideas we love. It signals a lack of faith in people, in its supposition that they are unable to choose in the marketplace of ideas.

Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) at 168 (Concurrence by J. Markey).

Similarly, many cases stand for the proposition that government officials may not restrict access to a public forum simply because they disagree with, or disapprove of, the views to be expressed there. See, e.g., Niemotko v. Maryland, 340 U.S. 268, 95 L.Ed. 267 (1950); Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953).

Nor may groups be invidiously singled out for persecution based on their membership:

> The Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group

> which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered.

NAACP v. Button, 371 U.S. 415 (1963).

Government even-handedness without regard to race is also grounded in the Fifteenth Amendment. Gomillion v. Lightfoot, 364 U.S. 339 (1960)(Redrawing boundaries of City of Tuskegee as a 28-sided polygon was a device to disenfranchise Blacks in violation of the Fifteenth Amendment).

It is long settled that "The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). Accord, Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Mr. Justice Jackson crystallized these concepts from varying Constitutional sources into a single principle in his famous quote from West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628 (1943):

> If there is any fixed star in our constitu- tional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

This "fixed star" shines on political decisions as well. Mr. Justice Brennan found in the Constitution "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes

unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The concept of government as neutral referee was old even when it was incorporated into our Constitution. Our entire concept of equal protection and due process of law, with speedy trials before an impartial judiciary and judgment by a jury of our peers is grounded in Magna Carta. See esp. Clause 39:

> No free man shall be taken, imprisoned, deprived of possessions, outlawed, exiled or in any way diminished, nor shall we go against him or send anyone against him except by means of a legal judgment of his peers or by means of a law of the land.

Magna Carta in America, David V. Stivison, Ed., Magna Carta Research Foundation, 1993, p. 17 (trans. by Dr. Richard L. Bates). This is one of only four clauses of Magna Carta still in effect in England today and is one of our great common grounds with the English system of justice. Halisbury's Statutes of England and Wales, 4th Ed. (1985), Magna Carta, Ch. 29, pp. 14-17.

The meaning of the words of Magna Carta, incorporated into our Fourteenth Amendment, applies as well to Plaintiffs' claim in this case:

> [T]hey were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

The Bank of Columbia v. Okey, 4 Wheat. (17 U.S.) 235 (1819). This guarantee, rooted in Magna Carta and

incorporated into our Constitution and Bill of Rights over five centuries later, is what Plaintiffs desire: Freedom from the arbitrary exercise of the powers of Ohio's government in favor of some citizens and against others, with no other guideline than personal passion and party advantage.

VI. SUMMARY AND CONCLUSION

This case is a contest between those, like Plaintiffs, who believe that voters should choose their Representatives and those, like Defendants, who believe that Representatives should choose their voters.

At this stage of this litigation, Plaintiffs ask only that this Honorable Court DENY the Defendants' Motion to Dismiss the Complaint, because one or more of the allegations of Plaintiffs as described above will require a trial to resolve and, if resolved in Plaintiffs' favor, will require that Ohio be redistricted.

No other similar case, challenging a collusive bipartisan gerrymander on the basis of the specific harm it has caused specific individuals and groups, from across the political spectrum, has ever been brought to the Court for resolution.

This will also be the first case to place before the Court the full range of impartial districting procedures developed in the past several years, which can be used by the Ohio legislature to cure the Constitutional defects in its districting decisions, procedures which are subject to independent objective verification and which will not bog the Court down in unending supervision of Ohio elections.

Plaintiffs, like the Founding Fathers, believe that "Justice is the end of government" and that "the people are the only legitimate fountain of power." The Federalist

Papers, Mentor book ed., 1961, p. 324, No. 51 [Madison]; p. 313, No. 49 [Madison]. For the first time in American history, the means exist to turn those sentiments into fact. These Plaintiffs ask that this Court now start that transformation.

Respectfully submitted,

/S/ David V Stivison

David V. Stivison, Esq.
870 North 30th Street
Philadelphia PA 19130-1104
(215) 763-2809
Counsel for Plaintiffs .

Dated: March 21, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Answer to Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) has been mailed by regular U. S. Mail, first class postage prepaid, on this 21st day of March, 1995, to:

DIANE R. RICHARDS
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Fl.
Columbus OH 43215-3428

/s/ David V Stivison
David V. Stivison

PLAINTIFFS' ANSWER TO

DEFENDANTS' MOTION TO DISMISS COMPLAINT

PURSUANT TO FED. R. CIV. P. 12(B)(6)

ATTACHMENT A

Containing:

1. Text of Ohio Anti-Gerrymander Amendment

2. Explanation "The Ohio Anti-Gerrymander Amendment", by David L. Horn and Joan W. Lawrence plus notes and figures

Note: Judicial Notice may be taken of the Ohio Anti-Gerrymander Amendment, which is also a public record or report admissible under Fed.R.Evid. 803(8). The explanation of that document is within the "learned treatise" exception to the hearsay rule, Fed.R.Evid. 803(18).

TEXT OF OHIO ANTI-GERRYMANDER AMENDMENT

As we have noted earlier, the Ohio Anti-Gerrymander Amendment has been modified/revised many times since its initial introduction in 1978. The appendix recaps in tabular form the legislative history of the amendment, listing the various designations it has had and its sponsors at various times. The major difference between some versions and others relates to nesting. H.J.R. 90, H.J.R. 15, H.J.R. 8, and H.J.R. 36 are fully-nested. The remaining versions are partially nested. In the text which follows we set forth both versions. The sections, divisions, and clauses which are common to both versions are in single, full-width column. Where the versions differ the text is divided into two columns with the partially-nested version on the left and the fully-nested version on the right.

Section 1. In each year ending in one and only at that time, this state shall be divided into as many congressional districts as there are seats in the United States house of representatives apportioned to the state,

ninety-nine general assembly house districts, and thirty three senate districts.	and into the general assembly house and senate districts prescribed by this article.

Section 2. (A) The whole population of the state, as determined by the most recent federal census, shall be divided by the number of United States representatives apportioned to the state pursuant to that census, and the quotient shall be the ratio of representation in the congress for the next ten years.

(B) The apportionment of the state for members of the general assembly shall be made in the following manner: the whole population of this state shall be divided by the number "thirty-three," and the quotient shall be the ratio of	(B) The whole population of the state shall be divided by two times the number of United States representatives and the quotient shall be the ratio of representation in the senate for the next ten years.

representation for the senate for the next ten years.

The whole population of the state shall be divided by the number "ninety-nine," and the quotient shall be the ratio of representation for the house of representatives for the next ten years.

(C) The whole population of the state shall be divided by six times the number of United States representatives and the quotient shall be the ratio of representation in the house of representatives for the next ten years.

Section 3. (A) The population of each congressional district shall be as nearly equal as practicable to the congressional ratio of representation, as provided in Section 2 of this Article, and no such district shall contain a population of less than ninety-nine percent or more than one hundred one percent of that ratio. The population of each senate or house of representatives district shall be substantially equal to the ratio of representation for the senate or the house of representatives, respectively, as provided in Section 2 of this Article, and in no event shall any senate or house of representatives district contain a population of less than ninety-five percent or more than one hundred five percent of the applicable ratio of representation.

(B) Each senate district shall be composed of three contiguous house of representatives districts. Senate districts shall be ranked in order of area, and that district largest in area shall be numbered "one," and so forth, until the smallest in area is numbered "thirty-three."

(B) Each congressional district shall be divided into six house of representatives districts, which shall be combined into two senate districts, each composed of three contiguous house of representatives districts. The senate district that is larger in area shall be given an odd number. The senate district that is smaller in area shall be given an even number consecutive to the number of the other senate district within the congressional district.

(C) Terms of senators representing odd-numbered districts shall commence on January 1, 2003. Terms of senators representing even-numbered districts shall commence on January 1, 2005.

Section 4. Each house of representatives district shall be entitled to a single representative in each general assembly. Each senate district shall be entitled to a single senator in each general assembly.

Section 5. District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing redistricting except as provided in Section 12 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within a district may be changed during that time.

Section 6. (A) As used in this Article:

(1) "Perimeter segment" means a portion of the perimeter of this state or of a township, municipal corporation, census tract, or block numbering area, or unit thereof as established in division (D) of this section, that coincides with the perimeter of another state or of another township, municipal corporation, census tract, or block numbering area, or unit thereof.

(2) "Census tract," "block numbering area," and "census block group" mean the geographical units designated by these terms in the most recent federal census and include any comparable geographical units called by other names in a federal census after the effective date of this amendment.

(3) "County fragment" means one of the portions of a county resulting when a county is divided between two or more senate districts, in the case of a senate plan, or congressional districts, in the case of a congressional plan, or house of representatives districts in the case of a house of representatives plan.

(4) "Municipal fragment" means one of the portions of a municipal corporation resulting when a municipal corporation is divided between two or more senate districts, in

the case of a senate plan, or congressional districts, in the case of a congressional plan, or house of representatives districts, in the case of a house of representatives plan.

(5) To determine the "compactness ratio" of districts for purposes of this Article, each person submitting a plan shall:

(a) compute the area of each district in his plan;

(b) compute the perimeter of each district in his plan;

(c) compute the compactness ratio of each district in his plan by dividing the area of each district by the square of its perimeter;

(d) compute the compactness of any district that includes the Ottawa County township of Portage or Danbury, any of the Lake Erie islands, or the Meigs County township of Sutton, Lebanon, or Letart, as if this area were not contained in that district.

(B) On the first day of May in each year ending in one, the secretary of state shall, by public notice, invite any person to submit a plan for dividing the entire state into

congressional districts, congressional districts. senate districts, or both.

Any person intending to submit a plan shall file a notice of intent with the secretary of state by the fifteenth day of May, along with a fee in an amount to be fixed by law not to exceed one hundred dollars for each plan.

(C) On the first day of June of the same year, the secretary of state shall publish and distribute to any person who filed a notice of intent to submit a plan, documents indicating the population, length of perimeter segments, and area of each county, township, municipal corporation, census tract, and block numbering area in the state whose population does not exceed a threshold equal to

one percent of the ratio of representation in congress or five percent of the ratio of representation for the house of representatives, whichever is smaller.

four-fifths of one percent of the ratio of representation in congress.

(D) The secretary of state shall divide any township, census tract, or block numbering area whose population exceeds the threshold defined in this section, or which contains parts of more than one municipal corporation, into the fewest possible units of contiguous territory containing populations not exceeding the threshold or containing parts of more than one municipal corporation. When it is possible to perform such divisions in more than one way the secretary of state shall make that division resulting in the most compact units, as defined in Section 9(D) of this Article. The secretary of state shall include in the documents published under this division the population, length of perimeter segments, and area for each such unit.

(E) Information published by the secretary of state pursuant to this division, including census data and measurements made using established cartographic techniques, shall be presumed to be accurate.

Section 7. Each plan submitted pursuant to an invitation issued under Section 6 of this Article shall cover the entire state and shall be submitted in the manner prescribed by the secretary of state. The secretary of state shall require that each plan include a summary sheet listing the population and compactness ratio of each district in each plan, the identity of each county divided by the plan, the number of county fragments resulting from the plan, the identity of each municipal corporation divided by the plan, and the number of municipal fragments resulting from the plan. The summary sheet shall include a statement, signed by the person submitting the plan, attesting that the criteria in Section 8 of this Article have been met. All plans shall be filed with the secretary of state not later than the first day of July in each year ending in one, and subsequent to that date shall be available for public examination.

Section 8. The secretary of state shall examine the summary sheet of each plan submitted under Section 7 of this Article and determine whether the plan described in the summary sheet apparently conforms to the following criteria:

(A) The plan shall meet the appropriate district population requirements of Section 3 of this Article.

(B) Each township, municipal corporation, census tract, or block numbering area, or unit thereof, as published by the secretary of state under Section 6 of this Article, shall retain its integrity and shall not be divided between two or more districts.

(C) Each district created by the plan shall be composed of contiguous territory and be bounded by a single, non intersecting, continuous line.

(D) No district created by the plan shall have a compactness ratio of less than thirty-thousandths as calculated according to division (A)(5) of Section 6 of this Article, except in the case of districts wholly or partially included in counties having at least one congressional ratio of representation, where the minimum compactness ratio shall be twenty-four thousandths.

(E) The general assembly may, by law, specify minimum and maximum percentages of minority populations for specified numbers of congressional, senate, and house of representatives districts. If the general assembly specifies such percentages, a plan submitted under Section 7 of this Article need not conform to the criteria set forth in divisions (C) and (D) of this section if supersession of either of these criteria is necessary to meet the specifications of such law. Such supersession shall pertain only to districts formed to comply with such law.

Section 9. (A) The secretary of state shall choose, from among the plans qualifying under Section 8 of this Article, one plan for congressional

Section 9. (A) The secretary of state shall choose, from among the plans qualifying under Section 8 of this Article, one plan for congressional

districts and one plan for senate districts, in accordance with this section.

districts, in accordance with this section.

(B) The secretary of state shall determine for each qualifying plan, on the basis of the information provided on its summary sheet, the total number of county fragments contained in it and the total number of municipal fragments contained in it. The secretary of state shall designate the plan that has the fewest county fragments the apparent winner. He shall then make a detailed examination of the supporting documents of the apparent winner to determine whether the information provided on its summary sheet is true and correct. If it is, the secretary of state shall, not later than the fifteenth day of August in each year ending in one, declare that plan the winner and that plan shall be the plan in effect for the next ten years.

He shall publish for public distribution the map and list of units comprising the districts in the senate plan chosen.

He shall publish for public distribution the map and list of units comprising the districts in the plan chosen.

(C) If examination of the supporting documents of the apparent winner fails to verify the information provided on its summary sheet, that plan shall be disqualified. The secretary of state shall then determine the apparent winner from the remaining plans and follow the same verification procedure used in division (B) of this section. If the data provided on the summary sheet of the second apparent winner cannot be verified, the verification procedure shall be repeated until the plan that best meets the criteria of this section is found.

(D) If two or more qualifying plans each contain the fewest county fragments, the secretary of state shall choose that plan that has the fewest municipal fragments, not counting those derived from municipal corporations that are included in more than one county. If two or more qualifying plans each contain the fewest municipal fragments, the secretary of state shall choose that plan whose least compact district has the highest compactness ratio.

(E) If the least compact districts of two or more qualifying plans have the same compactness ratio when rounded to two significant figures, the secretary of state shall compare the compactness of the next least compact districts of those plans, and the plan whose district has the highest compactness ratio, when rounded to two significant figures, shall be chosen. If no plan can be chosen after comparing the next least compact districts, the secretary of state shall compare the third least compact districts, and so on, until one plan emerges as the preferred one.

(F) The secretary of state shall not disqualify any plan because the plan or summary sheet contains minor technical errors that have no substantive effect.

Section 10. (A) Not later than the fifteenth day of August in each year ending in one, the secretary of state shall, by public notice, invite any person to submit a plan for dividing any number of

senate districts congressional districts

established by the chosen plan into house of representatives districts. The secretary of state shall distribute to any person who intends to submit such a plan the documents published in accordance with division (C) of Section 6 and division (B) of Section 9 of this Article. Each plan shall be submitted in the manner prescribed by the secretary of state. The plan shall include for each

senate district congressional district

being divided a summary sheet as provided in Section 7 of this Article and shall be accompanied by a filing fee in an amount to be fixed by law not to exceed ten dollars per

senate district congressional district

being divided; however, the total fee shall not exceed one hundred dollars. All plans shall be filed with the secretary of state not later than the fifteenth day of September in the same year.

(B) The secretary of state shall, not later than the first day of November of each year ending in one, choose a winning plan from among qualifying plans, using the same selection procedure provided in Sections 8 and 9 of this Article.

Within each congressional district the secretary of state shall combine house of representatives districts to form two senate districts, as prescribed in Section 3 of this Article. He shall choose the combinations of house districts which best satisfy the requirements of Sections 8 and 9 of this Article, provided that, if no contiguous combination of house districts produces senate districts meeting the requirements of Section 8(D), then the most compact combination shall be chosen, regardless of the number of county and municipal fragments created. He shall, at the time he publishes the chosen plan for senate districts, publish the computations he used in determining the compactness of the various possible combinations. The secretary of state shall publish the chosen plan for senate districts no later than the first day of December of each year ending in one, and that

plan shall be in effect for the next ten years.

(C) The general assembly shall, by law, prescribe a procedure for numbering congressional districts and house of representatives districts that precludes the exercise of discretion in the assigning of numbers, and the districts of the chosen congressional districting plan and the chosen house of representatives plan shall be numbered accordingly.

(D) The general assembly may, by law, adjust:

(1) The dates specified in Sections 6 and 7, division (B) of Section 9, and divisions (A) and (B) of Section 10 of this Article to reflect the availability of census data, the time the secretary of state requires to process plans, the filing dates for primary elections, and other factors.;

(2) The filing fees provided for in division (B) of Section 6 and division (A) of Section 10 of this Article to account for inflation.

Section 11. At any time the boundaries of senate districts are changed in any districting plan adopted pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan is adopted shall hold office for the remainder of the term for which he was elected, if he is a resident of a newly created district not electing a senator within two years of the time the plan is made. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the district shall be represented by the senator whose former constituents make up the largest fraction of the population of the new district. In all other cases, elections shall be held to ensure that the terms of senators conform to the provisions of Section 3 of this Article.

Section 12. The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article involving the districting of either house of the general assembly. Petitions challenging a districting plan adopted by the secretary of state shall be filed with the court no later than

thirty days after the public announcement of the decision to adopt the plan.

Section 13. The boundaries of senate districts, house of representatives districts, and congressional districts from which senators, representatives, and members of congress were elected to the one hundred seventh congress and the one hundred twenty-fourth general assembly, shall remain in effect until January 1, 2003 and the representatives and members of congress elected in the general election in 2000 shall hold office for the terms for which then elected.

Section 14. The various provisions of this article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

APPENDIX: LEGISLATIVE HISTORY OF OHIO ANTI-GERRYMANDER AMENDMENT

General Assembly	Date Introduced	Designation	Sponsors (underlined); Co-sponsors Democrats:	Republicans:	Disposition
112th	Sept. 15, 1978	H.J.R. 90	Dale Locker, Virginia Aveni, Gene Branstool, Sherrod Brown, Ronald James, Mike Stinziano, Dennis Wojtanowski	Claire Ball	Never referred to a standing committee
113th	Feb. 15, 1979	H.J.R. 15	Dale Locker, Paul Leonard, Robert Boggs, Gene Branstool, Sherrod Brown, John Begala, Ed Hughes, Ronald James, Dennis Wojtanowski	Claire Ball, John Galbraith	Never referred to a standing committee
	May 17,1979	S.J.R. 12		Sam Speck	Died in reference committee
114th	Jan. 21, 1981	H.J.R. 8	Dale Locker, Robert Boggs	Claire Ball	Never referred to a standing committee
	Jan. 30, 1981	S.J.R. 5		Sam Speck, Paul Malle	Three hearings by Senate Committee on Elections but no committee vote
115th	May 24, 1984	H.J.R. 35		Joan Lawrence, Ron Amstutz, Louis Blessing, Robert Brown, Jim Buchy, Joan Davidson, John Galbraith, Thomas Pottenger, Ben Rose, Marie Tansey	Never referred to a standing committee
	May 24, 1984	H.J.R. 36		John Galbraith, Louis Blessing, Jim Buchy, William Donham, Joan Lawrence, Thomas Pottenger	Never referred to a standing committee
116th	Nov. 12, 1985	H.J.R. 33		Joan Lawrence, Ron Amstutz, Louis Blessing, Jim Buchy, Joan Davidson, John Galbraith, Thomas Pottenger, Ben Rose, Marie Tansey	Never referred to a standing committee
	Nov. 12, 1985	S.J.R. 30	Gene Branstool	Robert Ney, Robert Cupp, Charles Horn, Donald Lukens, H. Cooper Snyder	Following hearings and markup, was recommended for passage, 5-4, by Cmte. on State Govt. on May 23, 1986; but never reached floor of Senate
117th	Feb. 17, 1987	H.J.R. 7		Joan Lawrence, Ron Amstutz, Gene Byers, Joan Davidson, Tom Johnson, E.J. Thomas, Dale VanVyven, Lynn Wachtmann	Never referred to a standing committee
118th	March 30, 1989	H.J.R. 7		Joan Lawrence, Ron Amstutz, William Batchelder, Louis Blessing, Gene Byers, Joan Davidson, David Johnson, Tom Johnson, Thomas Pottenger, E.J.Thomas, Dale Van Vyven, Lynn Wachtmann	Never referred to a standing committee
119th	March 19, 1991	H.J.R. 4	Jerry Krupinski, June Lucas	Joan Lawrence, Ron Amstutz, William Batchelder, Richard Finch	Never referred to a standing committee
120th	March 10, 1993	H.J.R. 2	Karen Doty, Jerry Krupinski, Daniel Troy	Joan Lawrence, Ron Amstutz, William Batchelder, Gene Krebs	Referred to Committee on State Government One hearing

THE OHIO ANTI-GERRYMANDER AMENDMENT

David L. Horn
Center for Research into Governmental Processes, Inc.

Joan W. Lawrence
Ohio House of Representatives

An updated and expanded version of Part I of "The Ohio Anti-Gerrymander Amendment: Impact on Representative Government": Paper delivered at the 1990 Annual Meeting of the American Political Science Association, San Francisco, California August 31, 1990. This document is microfilmed and indexed as an erratum in the 1992 APSA panel papers with University Microfilms 300 North Zeeb Rd., Ann Arbor, MI 48106.

TABLE OF CONTENTS

Rationale 2

Districting Criteria 6

Result-Oriented Criteria 6

1. *Competitivenesss.* 7
2. *Incumbent Protection* 8
3. *Minority Representation* 9
4. *Proportionality* 9
5. *Symmetry* 10
6. *Range of Responsiveness* 12
7. *Chalk Test* 13

Concluding Comments on Result-Oriented Criteria 14

Formal Criteria 19

1. *Equality of Population* 20
2. *Contiguity* 21
3. *Compactness* 22
4. *Non-division of Local Governmental Units* 26
5. *Non-division of "Communities of Interest"* 29
6. *Boundary Alignment; Nesting; Coterminality* 36
7. *Special Rules* 43

Employment of Formal Criteria in a Districting Procedure

Choice of an Optimizer 45

Supersession of Compactness and Contiguity Constraints 49

Method of Implementation 51

1. *Legislature/Commission* 51
2. *Competitive Submissions* 53

Commentary on Other Provisions 54

Sections 4, 5, and 6 54
Sections 7 57
Sections 8 and 9 58
Section 10 60
Sections 11 and 12 62
Sections 13 and 14 63

Text of Ohio Anit-Gerrymander Amendment 64

Appendix: Legislative History of Ohio Anti-Gerrymander Amendment

Figures

The Supreme Court's decision in *Shaw v. Reno*[1] has reopened the issue, thought by some to have been settled in *United Jewish Organizations of Williamsburg v. Carey*,[2] of whether a state may engage in race-conscious districting---or "affirmative gerrymandering." The *Shaw* decision gives pause to those who, similarly, think the issue of political gerrymandering was settled by the Court's affirmance of the dismissal of *Badham v. Eu*.[3]. Some new lawsuit may reopen the political gerrymandering issue, and do it by posing a very simple question: may a state take sides in an election?

The quick response to that question is "Of course not, but when it comes to political districting, discretion is neccessary. District lines have to be drawn somewhere, and wherever they are drawn some candidates will be helped, and others hurt. Someone has to exercise this discretionary power, and that should be the elected officials whom the voters have chosen to act in behalf of 'the state.' These officials may be suspected of discriminatory line-drawing---of 'taking sides,' as you put it---but there is no alternative."

There *is* an alternative. In a paper given at the 1989 meeting of the American Political Science Association[4](APSA) we stated that for the first time in American history, serious, practical proposals were being put forward that, if adopted, would remove---or virtually remove---discretion from political districting. In two states such proposals have been drafted into bills or resolutions and introduced in the legislature.[5,6] In two other states such

---

[1]113 S.Ct. 2816 (1993)

[2]430 U.S. 144 (1977)

[3]694 F.Supp. 664 (N.D. Cal. 1988)

[4]David L.Horn, V. Goedicke, C.R. Hampton, J.W. Lawrence, A.J. Vandenberg, and B.A. Wolman. 1989. "Can Neutral Districting Procedures Yield 'Gerrymandered' Results?" Paper delivered at the annual meeting of the American Political Science Assn. Atlanta, GA.

[5]Joan W. Lawrence et al, *House Joint Resolution (H.J.R.) 2* , (120th Ohio General Assembly, 1993-94).

[6]S. 6166, (Regular Session, New York Senate, 1981-82).

proposals, although undrafted as legislation, have credible backing.[7,8] Figure 1 sets these proposals within the larger context of how a constitutionally-mandated neutrality principle in political districting might be implemented. Note that, *in theory*, such a principle could be implemented by giving discretionary line-drawing power to an impartial person, or agency. In practice, however, there is no such thing; so the only practical alternative is an impartial procedure.

(Figure 1 about here)

The Ohio reform proposal has the longest history; is the only one with sponsors from both major parties;[9] and at one point got as far as a favorable recommendation from a committee of the legislature.[10] In this article we describe the rationale for this proposal; discuss and critique results-oriented criteria and formal criteria, and include with the latter a presentation and explanation of the Ohio proposal.

Rationale

We define gerrymandering as the act of a state taking sides in an election between two candidates by writing a statute, or administrative order, delineating boundaries of legislative or congressional districts in a way that favors the election of one candidate over the other.

The problem is that one cannot usually prove that in promulgating a districting plan a particular state acted to favor one candidate over another. As noted above, district lines

---

[7]Leroy Hardy and Alan Heslop, *Redistricting Reform: An A.C.T.I.O.N. Program*, (Claremont McKenna College, CA: The Rose Institute, 1990)

[8]Norman S. Primus, "The Balanced Neutral Process, (Redistricting U.S.A., South Bend, IN 46617).

[9]Robert Ney et al, *Senate Joint Resolution 30*, (116th Ohio General Assembly, 1985-86).

[10]*Ohio Senate Journal*, (23 May, 1986), Page 1593.

have to be drawn somewhere, and wherever they are drawn some candidates will be helped and others hurt. Most of the time we can only *suspect* that personal/partisan favoritism, or personal/partisan vindictiveness, is at work. The only "proof" we would be able to offer requires a reversal of the presumption. It would require us to *assume* that a state has acted to favor candidate A over candidate B (or Party A over Party B) unless it can demonstrate that the districting plan in question was arrived at in an impartial manner.

If Daniel Lowenstein's chapter in the 1990 Grofman anthology,[11] or the Federal District Court's ruling in *Badham v. Eu*,[12] represent the correct interpretation of *Davis v. Bandemer*,[13] that ruling is a dead letter so far as the major parties are concerned. If Lowenstein's *is* a correct reading of that decision some nagging questions persist: (1) Why then, didn't the High Court (as Bernard Grofman suggests[14]) simply issue a one-paragraph opinion in which it stated that the major parties do not qualify for protection because their adherents do not suffer oppression? (2) Why did the High Court affirm *Badham* without stating its rationale, and without commenting upon its relation to *Davis*? (3) Why did Justice White, the author of the plurality opinion in *Davis*, in an earlier case[15] comment about gerrymandering being "a far greater threat to equality of representation . ." when it is clear from the context of those words that he wasn't referring to minor parties or fringe groups?

---

[11] Daniel Hays Lowenstein, *Bandemer's* Gap: Gerrymandering and Equal Protection. In B. Grofman, ed., *Political Gerrymandering and the Courts.* Agathon: New York (1990).

[12] 694 F.Supp. 664 (N.D. Cal. 1988)

[13] 478 U.S. 109 (1986)

[14] Bernard Grofman, 1990. Toward a Coherent Theory of Gerrymandering: *Bandemer* and *Thornburg*. In B. Grofman, ed., *Political Gerrymandering and the Courts.* New York: Agathon. Page 48.

[15] *Wells v. Rockefeller* 394 U.S. 542, 555 (1969)

Lowenstein fails to persuade us and we believe that gerrymanders aimed at Democrats and Republicans *could* be proscribed. If that possibility does exist, it is also quite clear that the standard of proof the Court will demand amounts to an *impossibility* criterion---as opposed to a *bias* criterion. Our research in Ohio and Indiana demonstrates that given the increasing dealignment of the American electorate, it is virtually impossible to prove that most districts in a given plan are out of reach to the disadvantaged party. For example, if the 1980 vote for Ronald Reagan is aggregated among the districts of a Democratic party "gerrymander" of the Ohio General Assembly, it can be shown that if Republican legislative candidates ran only as well as their party's leader they would control the Ohio house and senate. Conversely, if the 1980 vote for John Glenn is aggregated among the districts of a Republican party "gerrymander" of the Ohio General Assembly, one can demonstrate that Democrats would control that body if only their candidates ran as well as their party's senior senator. Therefore, neither plan is a gerrymander because it is not *impossible* for either party to win a majority of seats under such plans.

On the other hand, it can be demonstrated that *bias* exists in both such plans. But bias implies a continuum and no court is likely to rule against bias because that would require a necessarily arbitrary decision as to how much bias was "too much"---where along the continuum the cutoff point lies, as well as which of the various tests for bias is to be employed. For these reasons we suspect that methods to "prove" partisan gerrymandering being proposed in the political science community are largely academic and the courts will end gerrymandering only when they decide to reverse the presumption. For evidence that such a reversal of presumption is possible consider these words of Justice Sandra Day O'Connor, writing for the majority in *Shaw*:

> We emphasize that (the 'traditional districting' criteria of compactness, contiguity, and respect for political subdivisions) are important not because they are required (they are not), but because they are objective factors that

> may serve to defeat a claim that a district has been gerrymandered on racial lines . . .[16]

Justice O'Connor is talking about racial gerrymandering, but her resoning could just as well be applied to political gerrymandering: if a state has not drawn its plan to effectuate a consistently applied policy of adopting whichever plan best satisfies "traditional districting criteria," it would not be able to "defeat a claim" that its plan "has been gerrymandered" on *political* lines.

Reversing the presumption implies that plans drawn according to an impartial, or neutral procedure do not unintentionally favor one party over the other. Lowenstein and several other critics argue that such unintentional favoritism is either a possible or a probable outcome---that the so-called "formal" criteria are biased. We refer to their argument as the Unintentional Gerrymander Hypothesis. In our paper presented at the 1990 meeting of the APSA[17] we examined the evidence Lowenstein cited to support his argument and found it wanting. Our 1989 APSA paper had concluded that "so far as Ohio congressional districting is concerned, there is no evidence to support the Unintentional Gerrymander Hypothesis . ."[18] Our unpublished studies of 1980s Indiana and Ohio legislative districting[19] and of 1992 Ohio congressional districting[20] provide further evidence that the Unintentional Gerrymander Hypothesis is without merit.

---

[16]113 S. Ct. 2816, 2827 (1993)

[17]Joan W. Lawrence and David L. Horn, 1990. "The Ohio Anti-Gerrymander Amendment: Impact on Representative Government" Paper delivered at the annual meeting of the American Political Science Assn. San Francisco, CA Pages 37-57.

[18]Horn et al, *op.cit.* Note 4 at 25-26.

[19]David L. Horn, Unpublished documents distributed at districting seminar conducted by Center for Research into Governmental Processes, Inc. in Columbus, OH on November 17,1990.

[20]David L. Horn, Unpublished document analyzing eight congressional districting plans considered by the Ohio General Assembly in 1992.

It is beyond the scope of this article to examine this controversy in detail.

We assume that *any* discretion granted to persons charged with drawing a districting plan will be used for their personal or partisan benefit and, therefore, to the detriment of the rights of others. It follows from this that the only remedy is to remove the discretion. Discretion is removed either by specifying which units (*i.e.*, counties, cities, census tracts) must be added to which other units, in what order, to make a district[21] or by specifying the desired end result (*i.e.*, fewest county splits, etc.) and leaving it to the plan drawers to combine units in whatever way they can to best achieve it. We opted for the second alternative and now explain how we selected the criteria we did and how we arranged them.

Districting Criteria

Districting criteria may be broadly divided between "formal" criteria and "result-oriented" criteria. This division is recognized by both Lowenstein[22] and Grofman[23] and we concur in their taxonomy. Lowenstein lists eleven criteria of which the first five are "formal" and the last six "result-oriented."[24] Grofman lists six formal criteria, which include Lowenstein's five plus "nesting." Lowenstein's six result-oriented criteria do not directly correspond with Grofman's four result-oriented criteria, two of which subdivide into six or seven others. The result-oriented criteria all pertain to how a plan is to be *judged*; they are mostly unspecific as to how a plan is to be *drawn*.. We find the result-oriented criteria of

---

[21]This is the procedure followed by Hardy and Heslop. See Note 7 *supra*.

[22]Daniel Lowenstein and Jonathan Steinberg, 1985. The Quest for Legislative Districting in the Public Interest: Elusive or Illusory. UCLA Law Review, 33: 1–75.

[23]Bernard Grofman, 1985. Criteria for Districting: A Social Science Perspective. UCLA Law Review, 33: 77-184.

[24]Lowenstein, *op.cit.* Note 22 at 11.

little value in designing a discretionless districting procedure for the simple reason that *no* system of geographically-based districts can be guaranteed to produce a particular political result. A brief examination of Lowenstein's and Grofman's result-oriented criteria reveals why this is so.

Result-oriented Criteria

1. *Competitiveness.* Lowenstein's criterion No. 5 states "Districts should be 'marginal' or 'competitive' in order to allow close or hard-fought interparty contests." This corresponds to Grofman's criteria IV C and D and to Richard Niemi's Competitiveness criterion for districting.[25] Lowenstein differentiates between a "strong" and a "weak" version of this criterion and then proceeds to demolish each of them. He concludes that it is possible to create a strongly competitive plan "in the abstract" but

> "In a real state, with real incumbents, real campaign contributors, real media, real campaign managers, and real voters, the drawing of a plan in which all or nearly all districts turned out to be competitive in practice probably would be impossible."[26]

In the same vein he discusses the "weak" competitiveness criterion. He asks the obvious question of "how many" competitive districts and comments:

> "It is not nearly so easy to count the competitive districts in an actual districting plan as it is to bandy the concept about in academic journals."[27]

He delivers the *coup de grace* to constitutionalizing such a criterion by commenting that:

---

[25]Richard G. Niemi and John Deegan, Jr., 1978. "A Theory of Political Districting" American Political Science Review, 72: 1304-1323 at 1305.

[26]Lowenstein, *op.cit.* Note 22 at 39

[27]*Ibid* at 41

> "It is easier to declare that 'some' districts should be competitive than it is to declare *which* districts should be competitive."[28]

We agree. There is no way of ensuring that a plan has a given percentage of competitive districts without giving somebody discretion to decide *which* candidates get such districts and which do not. That would open the door to favoritism and vindictiveness, and that is antithetical to our objectives.

2. *Incumbent Protection.* Lowenstein's Criterion No. 6 states "Districts should not be drawn to protect incumbents." This corresponds roughly to Grofman's III B and C: no intentional candidate bias and no use of political data. Here we agree with the desirability of the criterion but differ with the conventional wisdom as to how to achieve it. Lowenstein challenges Harris Weinstein's attack upon incumbent protection by creating a straw man, which is to pose the alternative as "advantaging the challenger at the expense of the incumbent."[29] He goes on to quote Robert G. Dixon about the virtues of incumbency and then attributes to critics of incumbent protection the "remedy" of a discretionary districting procedure whereby certain, but not all, incumbents are "sacrificed." He then says (rightly) "The major stumbling block . . (of this) . . criterion is how to determine which incumbents should be sacrificed."[30]

There are two extremes to this debate. At one end are people who are so upset over the way incumbents in Congress and state legislatures are able to perpetuate themselves that they are advocating an arbitrary limit on the number of terms incumbents can serve. This attitude has led to the passage of term limitation amendments by initiative/referenda in several states during the past three years. Such limits deny to

---

[28] *Ibid* at 43

[29] *Ibid* at 45

[30] *Ibid* at 46

constituents the option of keeping in office someone they may want.

At the other extreme are persons like Lowenstein who believe we should give incumbents "an incentive for good service" by providing them with districts in which they "realistically can expect good service to be rewarded."[31] He does not say who shall design such districts. (Would it be the incumbents?)

Our position is squarely in the middle: Don't limit the terms an incumbent can serve. Don't give anyone discretion to create districts giving advantage to incumbents. Draw districts impartially and let the political chips fall as they may. This approach favors neither challengers nor incumbents. We don't see how the law can look at this issue any other way. A state has no business creating districts to favor, or *dis*favor, incumbents. It has no business creating districts to favor, or *dis*favor, challengers.

3. *Minority Representation.* Lowenstein's criterion No. 7 states "Some districts should be drawn to guarantee racial, linguistic, or ethnic groups a majority, but without including more members of the group than is necessary to ensure that group a reasonable possibility of electing a candidate of its choosing." This corresponds roughly to Grofman's Category II (Racial Intent) and Category IV (Racial Effect) criteria. It is one that could be placed under the rubric of "community of interest" in the formal criteria division. We shall do that, and defer consideration of this issue here.

4. *Proportionality.* Lowenstein's criterion No. 8 states "Districts should be drawn so that there will probably be a close or exact proportionality in the next election between a party's share of the total vote and its share of the total available seats." This corresponds to Grofman's IV F (Proportionality between vote share of each major political party and its legislative seat share) and IV E (Translation of a party's vote majority into a majority of seats in the legislature). IV E may be viewed as a special case of IV F

---

[31] *Ibid* at 47

because, if F is satisfied, so too will E. Proportionality is a special case of Niemi's Constant Swing Ratio[32] parameter in which that ratio is unity. On a seats/votes curve this case is represented by the 45-degree line of Figure 1 of his article.[33] Lowenstein makes the useful distinction between representing "votes" as the aggregate of all votes cast, and the mean percentage of votes cast in each district, by pointing out that in the real world the number of votes cast in each district is not the same and that the aggregate total definition penalizes the party whose turnout is lower. He, therefore, opts for the mean percentage, or "adjusted" vote definition and proceeds with his analysis.

The major flaw of proportionality in the U.S. system of single-member plurality-take-all districts is that, "under conditions of anything like the normal dispersion of party support, the majority party can expect to win a disproportionately large percentage of the seats."[34] This is Backstrom's "balloon" effect.[35] Lowenstein cites Backstrom's demonstration that efforts to draft a plan that will yield proportional results will greatly prejudice the majority party. We agree.

5. *Symmetry.* Lowenstein's criterion No. 9 states "Districts should be drawn to produce 'symmetry' among parties so that if the Democrats get *x* % of the seats with *y*% of the vote, the Republicans should also get *x*% of the seats if they get *y*% of the vote." This has no exact correspondence in Grofman's taxonomy, but it can be viewed as another special case of IV F. In Niemi's parameters this would be another case of Constant Swing Ratio, one that he labels

---

[32]Niemi, *op.cit.* Note 25 at 1305

[33]*Ibid* at 1307

[34]Lowenstein, *op.cit.* Note 22 at 53

[35] Charles Backstrom, Leonard Robins, and Scott Eller. 1978. "Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota," Minnesota Law Review, 62: 1121-1159 at 1134

"Neutrality."[36] To satisfy neutrality, or symmetry, the swing ratio need not be unity, but it must be constant over the range of vote percentages the parties are likely to get. Put another way, there can be no "break" in the seats/votes curve over this range. If Party A gets 60% of the seats with 55% of the votes, then Party B must, likewise, get 60% of the seats with 55% of the votes.

Lowenstein states that symmetry "seeks to overcome the defects of the proportionality criterion . . at a high cost, for the concept cannot be made operative and is, perhaps, incoherent."[37] Using the foregoing example, suppose in an *actual* election the Democrats get 60% of the seats with 55% of the votes. The criterion is satisfied if in the same election the Republicans *would have* received 60% of the seats had they received 55% of the vote. Lowenstein then says:

> "The symmetry criterion by definition depends on knowing something that cannot be known, namely what *would have* happened if what *did not* happen *had* happened."[38]

"Symmetry theorists" deal with this problem by hypothesizing a change of the votes received by each party in each district by a uniform number of absolute percentage points. A simple way to do this is to construct the seats/votes curve for the election in question and observe whether there is a "break" in it over the 40-60% vote range.

Niemi does this for the 1982 New Jersey congressional election conducted in the plan litigated in *Karcher v. Daggett*[39] and demonstrates that Democrats got seven of the 14 seats, or 50%, with 42.1% of the vote.[40]

---

[36]Niemi, *op.cit.* Note 25 at 1304

[37]Lowenstein, *op.cit.* Note 22 at 55

[38]*Ibid* at 56

[39]462 U.S. 725 (1983)

[40]Richard G. Niemi, 1990. The Swing Ratio as a Measure of Partisan

The Republicans, however, would have needed 56.4% of the vote to get the same 50% of the seats. Therefore, the *Karcher* plan failed the test of symmetry. It can be calculated from Niemi's swing ratio study of the 1982 Indiana elections[41] conducted under the plan at issue in *Bandemer* that the Republicans needed only 43.0% of the statewide vote to win 50% of the seats in the Indiana house. The Democrats, on the other hand, would have had to receive 56.6% of the statewide vote to win 50% of the seats in that body. Therefore, the *Bandemer* plan also failed the test of symmetry.

The main problem with the symmetry criterion is not the one Lowenstein poses. It lies, rather, in the fact that as a practical matter it would be exceedingly difficult to test a plan for symmetry *before* an actual election has been held under it. We did so in the case of our Ohio congressional districting study reported in 1989.[42] But such testing required constructing hypothetical-hypothetical seats/votes curves for the plans in question. With no actual election results to work with, we have to compute the partisan character of each district by a political index based on past statewide election results.[43] Such indices, as we pointed out earlier,[44] are fraught with uncertainties and arguable assumptions---ones Lowenstein would be quick to pounce upon. The even greater problem is, again, our inability to design a plan having "symmetry" without giving somebody discretion to draw districts having the correct political indices in the proper

---

Gerrymandering. In B. Grofman, ed., *Political Gerrymandering and the Courts.* New York: Agathon. Page 173

[41] Richard G. Niemi, 1985. The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering. UCLA Law Review, 33: 185-212 at 196-200.

[42] Horn et al, *op.cit.* Note 4 at 24

[43] The methodology for deriving such an index is described in David L. Horn and Charles R. Hampton, 1991. "Measuring Partisan Voting Strength: Roadblock to 'Proving' Partisan Gerrymandering" Paper delivered at the annual meeting of the American Political Science Assn. Washington, D.C.

[44] Horn et al, *op.cit.* Note 4 at 16-17

numbers. As with the case of designing the proper number of "competitive" districts, this would open the door to favoritism and vindictiveness. For these reasons we are forced to reject symmetry as a criterion of practical utility in *drawing* districting plans.

6. *Range of Responsiveness.* Since we have made repeated reference to Niemi's "A Theory of Political Districting" it might be appropriate at this point to insert the fourth of his parameters, Range of Responsiveness (R of R),[45] before taking up the last of Lowenstein's criteria. The R of R is the percentage range of the total (statewide) vote over which seats change from one party to the other. Its low end is the minimum percentage of the total vote required for a party to win at least one seat, while the upper end is the minimum percentage of the total vote required for a party to win all of the seats.

A wide R of R implies that there will be some districts so heavily laden with minority party supporters that they can be won even if that party's statewide vote is very low---say 20-25%. It ensures that the minority party will never be totally shut out. This would be the case if *every* seat were "competitive" by falling, say, within the 45-55% range. A large R of R is, therefore, in conflict with a high fraction of competitive seats and the "ideal" districting plan is one in which these parameters are in proper balance.

As with the criteria of competitiveness and symmetry, this is an easier criterion to implement in the abstract than to factor into an actual districting plan. First, there is the question of what R of R is to be specified; secondly, the problem of measuring the partisan character of the districts we are creating; and finally the problem of determining which candidates shall be assigned the purposefully "safe" districts that this criterion requires. Assuming the assignment would be at the discretion of persons empowered to do the districting, the opportunity for bribery---of one kind or another---would be awesome.

---

[45]Niemi, *op.cit.* Note 25 at 1304

7. *Chalk Test.* Lowenstein's criterion No. 10 states "Districts should be drawn so that a given party will win a number of seats that is sufficiently close to the mean number of seats that would be won by that party under a large variety of computer-generated plans, either drawn randomly or in accord with one or more of the formal criteria, such as compactness." Grofman does not include it in his taxonomy, but Niemi refers to Monte Carlo techniques,[46] which amount to the same thing. It is also described by Richard Engstrom.[47] Lowenstein argues, persuasively, that this test shows a bias in favor of the majority party because the great majority of possible ways to draw lines usually benefit the majority party.[48] He further argues that the test is biased against the party whose supporters are geographically concentrated. Since he assumes Democrats are so concentrated (an assumption we question) it follows that this test is biased against Democrats.

Whether biased or not, the test has serious practical problems. First, of course, is the lack of a reliable measure of the partisan character of the districts. Second, generation of a representative sample of alternative plans with which to compare the plan under scrutiny and assess the probability that its partisan distribution could have occurred by chance would be an enormous undertaking. Finally, the problem of applying such a test to a plan under which no election has taken place raises further uncertainties. It is simply not a practical criterion to employ in drawing plans.

Concluding Comments on Result-Oriented Criteria. As stated at the beginning of this section, no system of geographically-based districts can be guaranteed to produce a particular political result. That is because people may not

---

[46]Niemi, *op.cit.* Note 41 at 207

[47]Richard L. Engstrom, 1976. The Supreme Court and Equipopulous Gerry-mandering: A Remaining Obstacle in the Quest for Fair and Effective Representation. Arizona State Law Journal. 1976: 277-319 at 316-319

[48]Lowenstein, *op.cit.* Note 49 at 62

actually vote the way they are supposed to by the designers of the plan. There is no better way to demonstrate the futility of factoring result-oriented criteria into the construction of a districting plan than to relate a few historical examples where such was attempted.

In 1913 Ohio had a Democratic governor. Democrats controlled the Ohio senate 26-7 and the house 87-33. They passed H.B. 567,[49] a congressional districting law that remained in effect for 38 years. H.B. 567 was referred to as "the gerrymander bill," even in the official record.[50] The populations of the districts varied from 114,359 (- 47.2%) to 349,018 (+ 61.1%).[51] Of its 22 districts 17 were composed of entire counties. The remaining five split the urban areas of Cincinnati and Cleveland. The lowest compactness indices (19.5% and 24.1%) belonged to two heavily Democratic Cleveland districts---the two districts also having the highest populations. If the 1910 vote for governor (the best election to use as an index of "party strength") is aggregated among these districts, Democrats are a majority in 18 of 22---exceeding 65% in the two Cleveland districts.[52]

In the first election conducted under this plan (1914) Democrats won only nine districts (40.9%) with 50.2% of the aggregate vote. The mean population of those nine districts was 237,086. The mean population of the 13 districts electing Republicans was 206,737. Three elections later (1920) Republicans won *all* 22 districts, for a clean sweep, with 58.5% of the statewide vote. It would be hard to find a districting plan of partisan authorship that failed more badly to achieve the intended result. But the story does not end in

---

[49] *Ohio House Journal.* 1913. Volume 103 at 1287

[50] *Ohio Senate Journal.* 1913. Volume 103 at 988 (Index of bills of the House of Representatives)

[51] Statistical Report of the Ohio Secretary of State, 1913 at 580-582

[52] David L. Horn, unpublished data

1920. Sixteen years later (1936) the same plan gave Democrats 20 of 22 seats (90.9%) with 56.5% of the vote.[53]

A second example is the Connecticut legislative districting plan at issue in *Gaffney v. Cummings*. This plan was justified on grounds that it afforded "a rough approximation of the statewide political strength of the . . parties."[54] The elections held under the *Gaffney* plan yielded the following results:[55]

HOUSE				
Year	Democratic Votes	Democratic Seats	Discrepancy	King's λ
1972	47.0%	38.4%	- 8.6	- 0.252
1974	57.6	78.1	+ 20.5	1.095
1976	51.6	61.6	+ 10.0	0.265
1978	55.1	68.2	+ 13.1	0.432
1980	49.1	55.0	+ 5.9	0.124

Note how in 1980 Democrats, with a minority of the statewide vote, won a majority of House seats.

SENATE			
Year	Democratic Votes	Democratic Seats	Discrepancy
1972	45.8%	36.1%	- 9.7
1974	58.2	80.6	+ 22.4
1976	51.0	61.1	+ 10.2
1978	55.8	72.2	+ 16.4
1980	50.6	63.9	+ 13.3

---

[53] *Ibid.* Election data from *Congressional Quarterly Guide to U.S. Elections.* 1992. Washington: CQ Press

[54] *Gaffney v. Cummings* 412 U.S. 735, 752 (1973)

[55] David L. Horn, unpublished data compiled from Connecticut Blue Book of election statistics. These figures also check with those reported by Howard Scarrow. See Scarrow, Howard A. 1982. "Partisan Gerrymandering---Invidious or Benevolent? *Gaffney v. Cummings* and Its Aftermath." *Journal of Politics* 44: 810-821 (Table 1, pg. 814)

All ten of these discrepancies exceed the 5.8% magnitude that occurred in the 1982 election under the suspected partisan gerrymander in *Karcher v. Daggett.*[56] Eight of them exceed the 8.64% magnitude that occurred in the 1982 election under the alleged partisan gerrymander in *Davis v. Bandemer.*[57] Five of them exceed the 11.9% discrepancy that occurred in the 1982 election under the alleged partisan gerrymander in *Badham v. Eu.*[58] Using a different methodology which incorporates sophisticated statistical techniques, King[59] computed a bias parameter for the *Gaffney* house plan for the same elections. This measure, denoted by λ, is given in the fifth column. It is difficult to characterize in understandable terms, but note how its values are very consistent with our seats-votes figures: the ranking is precisely the same, from the strongest Republican bias in 1972 to the strongest Democrat bias in 1974. Our crude seats-votes comparison is thus confirmed and we conclude with the observation that, if seats/votes discrepancies on the order of 20% are "proportional representation," then that term is devoid of meaning.

A third example is the 1981 Republican-drawn congressional districting plan for Indiana. Two of the six

---

[56]David L. Horn, calculated from data in *Congressional Quarterly Guide to U.S. Ellections:* New Jersey, 1982

[57]David L. Horn, calculated from data in *1982 Election Report, State of Indiana.* The aggregate statewide vote of 51.64% was calculated by averaging the vote in the nine 2-member and seven 3-member districts. This differs from the 51.9% (the figure employed in the *Bandemer v. Davis* litigation) computed by totaling the "raw" figures in multi-member districts where one party, or the other, may not run a full slate.

[58]David L. Horn, calculated from data in "Statement of the Vote, 1982" compiled by California Secretary of State

[59]King, Gary. 1989. "Representation through Legislative Redistricting: A Stochastic Model." *American Journal of Political Science* 33: 787-824. (See Table 2, pg. 814. King does not accept the *Gaffney* plan's defenders' [including the respected authority of that time: Robert G. Dixon, Jr.] characterization of it as "fair" to both of the major parties. He categorizes it [along with Indiana] as an example of a plan done by a state "with (a) partisan redistricting process . .")

Democratic incumbent were paired in one of the new districts. Another two were paired in another new district. A fifth was placed in a Republican-dominated district with a strong Republican incumbent. Three districts had low compactness indices (19.5%, 25.8%, 26.1%)[60] for no apparent non-political reason. Thirteen counties were split when a ± 1% population spread can be attained while splitting only one county. Democrats cried "foul" and considered a lawsuit. Nine years later they found themselves an 8-2 majority in the state's delegation, having elected members in 1986 and 1989 in open districts that by any political index would be considered Republican.[61]

These examples demonstrate that even the most expert districting technology cannot guarantee an election result, given the nature of the U.S. electorate. Therefore, any attempt, however well-intentioned, to combine political and demographic data to create districting plans having such characteristics as competitiveness, proportionality, symmetry/neutrality, constant swing ratio, and wide range of responsiveness is an illusion.[62] It is significant that no one has ever drawn a real districting plan---using real demographic and political data in a real state---which incorporates the recommended result-oriented criteria.

Giving persons discretion to draw plans in an attempt to achieve the goals of result-oriented criteria will only grant

---

[60]Unpublished measurements performed by David L. Horn

[61]McDowell, James L. 1992. "Indiana" in Leroy Hardy, Alan Heslop, and George Blair, ed., *Redistricting in the 1980s*. The Rose Institute of State and Local Government, Claremont, California (pg. 94)

[62]Danny Kleinman, an astute scholar of of fair representation, adds this comment: "I concur in your rejection of result-oriented criteria, but I reject them even more vehemently. Suppose the various schemes you cited as intended to produce particular results succeeded (as your examples show they didn't). Would that make them *fair*? Would that make them *democratic* ? (small 'd')? Would that make the congressional delegations *more representative*? Absolutely not. So it is not because they *don't* work that we must reject them." We agree with Kleinman. But a philosophy-of-representation analysis of some length is required. We don't have space to do it here.

them an opportunity to reward friends and punish enemies which, even if not intentionally exercised, casts a pall over the electoral process and further erodes the will of the citizens to be involved in it.

Lowenstein states that "the formal criteria" have been "downgraded or rejected entirely by most of the more sophisticated students of redistricting," many of whom "have embraced, instead, . . the result-oriented criteria."[63] He has it backwards. The "sophisticated" students, among whom we (modestly) include ourselves, see the unworkability of result-oriented criteria and would employ formal criteria to strip discretion from the districting process. We now turn to a consideration of those criteria and the question of how to employ them in a discretionless districting procedure.

Formal Criteria

Given that result-oriented criteria are unworkable, we are faced with a choice of permitting map-makers discretion, or employing objective---or "formal"---criteria in such a way as to remove that discretion. Formal criteria differ from result-oriented criteria, generically, in that they do not involve, or require, any use of political data. They can also be characterized as objective and quantifiable---as opposed to subjective and nebulous. The key to using such criteria to remove discretion is to consider a criterion as being a *constraint* or an *optimizer*.

Employing a criterion as a constraint means that it is a rule that either *is* or *is not* met: it is not a matter of its being met to some degree. A district is either contiguous or it is not contiguous; it is either within the population variance or it is not within the population variance; its compactness index is either above 30% or it is not above 30% . . To employ a criterion in such a manner is to make it a constraint.

Employing a criterion as an optimizer means that it is a rule that is not an "either-or" case, but rather one in which it is met to a greater or a lesser degree. A district that is in only

---

[63]Lowenstein, *Op.Cit.* Note 22 at 35

two different pieces could be said to meet a contiguity criterion better than a district that is in four different pieces. A plan that has a ± 1% population variance can be said to meet a population equality requirement better than a plan with a ± 4% variance. A district with a compactness index of 30% can be said to meet a compactness criterion better than one with an index of 25%.

We may define a discretionary procedure as one in which all criteria are employed as constraints and none is employed as an optimizer. After a series of constraints is employed, subjective human judgment is exercised to make the final choice. A mechanical districting procedure, after reducing the possible options by a series of constraints, employs the final criterion as an optimizer in order to define what is the *best* plan and to make the final choice accordingly.

Lowenstein lists five formal criteria, combining two of them (population equality and contiguity) under one heading. Grofman adds a sixth, "coterminality." We shall consider these six, plus a seventh which we shall call "special rules."

1. Equality of population
2. Contiguity
3. Compactness
4. Nondivision of governmental units such as cities and counties
5. Nondivision of "communities of interest"
6. Boundary alignment, nesting, or coterminality
7. Special rules

We think the best way to evaluate these criteria and relate them to the actual text of the Ohio Anti-Gerrymander Amendment is to print the Amendment at the end of this article and cite the relevant passages of its text, in boldface, in the course of discussing the criteria.

1. *Equality of Population.* One need not review all the one-person-one-vote court cases to conclude that this criterion must be included. Lowenstein accepts it as "axiomatic"[64] and defends the very strict standards for

---

[64] *Ibid,* at 12

congressional districts that were applied in *Karcher v. Daggett.* Grofman considers the standard applied in *Karcher* as "extreme" and the courts' different standards for congressional and state districting as having "no clear rationale."[65] We share Grofman's view that a population variance less than the accuracy of the census count is unwarranted. In our Ohio reform proposals we have employed a ± 1% deviation for congressional districts (CDs) and a ± 5% deviation for legislative districts **[Sec. 3(A)]**. For the 1990 census the ratio of representation for Ohio CDs **[Sec. 2(A)]** is 570,901; a 1% deviation from that ratio would be 5709 persons. A 99-member Ohio house means a ratio of representation **[Sec. 2(B)]** for that body of 109,567 persons. If the population standard for such districts were ± 1%, the variance would be 1096 persons. The current provision in the Ohio constitution permits a ± 5% variance, or 5478 persons, and that has been the one employed in our proposals. A 114-member house implied by the fully-nested alternative, using the same 5% variance, would mean ± 4757 persons.

We agree with Grofman and others that there is no philosophical reason for permitting a higher variance in legislative than in congressional districting. There is a practical justification, however. Plans are made from "units," or "building blocks" (*i.e.*, counties, cities, townships, census tracts, block numbering areas, blocks). The smaller and more numerous these units are the more cumbersome and unwieldy is the necessary database and the process of constructing districts. A ± 1% population variance for congressional districting can be achieved with a maximum building block size of 5709. This will result in a database of about 4300 units for a state like Ohio. If the population variance for legislative districts is narrowed to, say, ± 1% one is forced to choose between what may be the technical impossibility of achieving a ± 1096 variance with building blocks of over 5000 persons, and reducing maximum building block size to 1000 resulting in an expansion of the database to 10,000+ units.

---

[65] Grofman, *Op.Cit.* Note 23 at 88-89

So the justification for a wider population variance involves, primarily, the pragmatic considerations of database and district construction. A secondary justification is that the wider the variance the easier it is to optimize such other criteria as compactness and nondivision of local governmental units. Whether such criteria *should* be optimized is another question. We only state here that to do so requires relaxing the population standard.

2. *Contiguity*. This criterion is so universally accepted that one might adopt it without argument. Lowenstein accepts it as "axiomatic."[66] Grofman describes it as "relatively trivial" and "usually noncontroversial."[67] However, we might have to override it in order to create a specified number of "majority-minority" districts. We will have more to say on that issue later. For the moment we adopt it, making a few specifications when we employ it in a districting procedure: In cases where water intervenes between bodies of land (*i.e.*, the Lake Erie islands) we shall assume that the legally-established nautical boundaries govern, should there arise a question of what is or is not contiguous. We need also specify that touching corners does not qualify as contiguous. Finally, we need to rule out "doughnuts." These latter objectives are normally achieved by using the language "bounded by a single, nonintersecting line" **[Sec. 8(c)]**.

3. *Compactness*. We dealt with this criterion, extensively, in a recently published article.[68] In it we concluded that "either the Cox or Goedicke area/perimeter-squared" measure is the best way to specify compactness in a districting procedure. By the Goedicke measure the compactness index = C.I. = $400\pi A/P^2$ where A is the area of a district in units of square measure and P is the perimeter of

---

[66]Lowenstein, *Op.Cit.* Note 22 at 12

[67]Grofman, *Op.Cit.* Note 23 at 84

[68]David L. Horn, Charles R. Hampton, and Anthony J. Vandenberg, 1993. "Practical Application of District Compactness," Political Geography, 12: 103-120.

the district in the same units of linear measure. By this formula all indices can be expressed as percentages, with the circle (having an index of 100) being the standard of reference. In our reform proposal, as currently drafted [Sec. 6(A)(5)(c)], the constant 400π is omitted, meaning that the value of a circle becomes 0.0796. We deleted the constant, thinking that the resultant formulation, A/P^2, is less intimidating to legislators afflicted with math anxiety. The Cox formulation is employed by Niemi and Wilkerson in their analysis of the *Bandemer* house plan[69] and by Hofeller and Grofman in their study of the compactness of California CDs.[70]

The difference between Cox and Goedicke is trivial: Cox uses the constant 4π whereas Goedicke employs 400π. Whichever of the foregoing three measures is used, the compactness ranking of districts is unaffected.

Recent work by Niemi et al[71] demonstrates a theoretical shortcoming of the area/perimeter-squared formulas: they do not adequately penalize dispersion of a geometric figure, while perhaps unduly penalizing a figure that is geographically concentrated, but having "sawtooth edges." This theoretical defect has no adverse consequences so far as prescribing a compactness measure to be used in a districting procedure is concerned. As we shall explain later on, because of the "sawtooth edges" problem we have decided

---

[69]Richard G.Niemi and J. Wilkerson. 1990. Compactness and the 1980s Districts in the Indiana State House: Evidence of Political Gerrymandering? In B. Grofman, ed., *Political Gerrymandering and the Courts.* New York: Agathon.

[70]Thomas Hofeller and Bernard Grofman. 1990. Comparing the compactness of California congressional districts under three different plans: 1980, 1982, and 1984. In B. Grofman, ed., *Political Gerrymandering and the Courts.* New York: Agathon.

[71]Richard G.Niemi, B. Grofman, C. Carlucci, and T. Hofeller. 1990. Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering. Journal of Politics, 52: 1155-1181.

to use two compactness thresholds in the most recent version of our legislation **[Sec. 8(D)]**.

The most important feature of a compactness measure to be used in a districting procedure is that it be one which permits *analytical* determination, as opposed to dependence upon graphical measurement. If the choice of a plan ultimately depends upon a compactness measurement, one can envision heated controversy over whose measurement of a particular district's area or perimeter was the correct one. When such measurements are made with a planimeter or curvimeter---or even with a computer/map digitizer---they will not be precise and even several replications will not give exactly the same numbers.

Such problems are obviated if areas and perimeters of all district building blocks are officially established *prior* to the commencement of districting activity. Then all participants in this activity would be using the same numbers and there would be no arguments afterwards. The best means for "officially establishing" such data would be for the secretary of state to engage an engineering firm to make the necessary measurements and publish them, along with population figures, in a catalogue available for public distribution. The firm making the measurements could use judgment and discretion as to the degree of precision employed, because whatever figures it came up with, regardless of how close or not close to the "true" values, would have to be used by everybody. Figure 2 gives an idea of how one page in such a catalogue might look.

(Figure 2 about here)
(reproduced with permission from *Political Geography*)

As with the contiguity criterion, it may be necessary to override a compactness requirement to create a specified number of "majority-minority" districts. We shall deal with this issue presently.

Lowenstein is vehement in his condemnation of a compactness criterion, calling it a "Republican Trojan

Horse."[72] Grofman sees no pro-Republican bias in the criterion but says its "usefulness . . has been vastly overrated."[73] As stated in the next-to-final paragraph in the section on "Rationale," we have elsewhere addressed Lowenstein's contention that compactness and other formal criteria have partisan bias. Here we address his assertion that it has "precious little virtue under modern conditions"[74] and "serves no cognizable purpose that can be plausibly identified with the public interest."[75]

What constitutes "virtue," or the "public interest," is a highly subjective judgment. Lowenstein's judgment is just as subjective as that of James W. Rankin who represented the 69th and 25th Ohio house districts from 1971-1978. HD 69 was a relatively compact Cincinnati inner-city district. In 1971, it was renumbered 25 and redrawn to afford a safe district next door for Rep. James T. Luken.[76] The new HD 25 was the dumbbell-shaped configuration shown in Figure 3A. When Rankin was presented with this *fait accompli* he was furious.[77] In times past he had been able to "walk" his district. Now it was an elongated affair virtually cut in two by Norwood.

(Figure 3A about here)

Sam Speck was elected to the Ohio House from a rural district that was redrawn in 1971 to yield the configuration

---

[72]Lowenstein, *op.cit.* Note 22 at 27

[73]Grofman, *op.cit.* Note 23 at 89

[74]Lowenstein, *op.cit.* Note 22 at 22

[75]*Ibid* at 25

[76]Private conversation in early 1980 between Robert Weidenfeld and Rep. Helen Rankin, widow of Rep. James Rankin, as reported by former to David L. Horn

[77]Rev. Robert S. Graetz, Jr., Ohio Council of Churches lobbyist who was close to Rankin: reported by Graetz to David L. Horn

shown in Figure 3B. He stated that "In going from one end of my district to the other, I had to drive for 30 miles through another district."[78] He was not pleased. The Ohio 10th CD was redrawn in 1982 (Figure 3C) to bypass Hocking County and extend the district's already long span another 30 miles. In 1982 Charles Overby, a candidate without much money but with a corps of dedicated volunteer workers, challenged the incumbent. Overby and his volunteers had to travel another 60 miles to campaign in the northern end of the district, passing through Hocking County which was in the 6th district. They were not amused. Lowenstein says, "given modern methods of transportation and communication, the size or shape of a district has little effect on the ability of a legislator to represent his or her constituents."[79] We disagree.

(Figures 3B and 3C about here)

We may have a different definition of "virtue" and "the public interest" than Lowenstein, but the point here is not whose definition is correct. Compactness is *one of several* criteria which can be used in combination to take discretion out of districting. Grofman misses the point when he grudgingly concedes the "potential usefulness" of compactness "as an indicia of possible gerrymandering."[80] Non-compactness cannot "prove" gerrymandering. Compactness *might* be employed, in conjunction with other criteria, to preclude the *opportunity* for gerrymandering.

4. *Non-division of local governmental units.* From the beginning, the Ohio reform proposals recognized the need for a database that described and specified the "units," or "building blocks," that would be used in constructing districts. These building blocks, of course, could not be divided by the map-makers; they had to be entirely included,

---

[78]Senator Sam Speck, 1981. Testimony before Ohio Senate Committee on Elections re. S.J.R. 5, 24 February.

[79]Lowenstein, *op.cit.* Note 22 at 22

[80]Grofman, *op.cit.* Note 23 at 89

or entirely excluded, from a district **[Sec. 8(B)]**. If a township or municipal corporation was below the maximum building block size (in the current Ohio proposal 1% of the ratio of representation for congressional districting, or 5709 persons), it follows that it would not be split. The original version of the Ohio anti-gerrymander amendment had no restriction on splitting governmental units other than these.[81] It was not much of a restriction because all Ohio counties, and many of its municipal corporations, exceed 5709 population. In this initial version population equality, contiguity, and building block integrity were the constraints. If the plans under scrutiny met those constraints, then compactness alone decided which of them would be adopted.

The principal reason for the criterion is that it is easier to tell someone who their state representative, state senator, or congressperson is if a county or city is not divided between districts. If someone is from Licking County, and you know Licking County is all within John Ashbrook's 17th CD, you can tell them, unequivocally, that Ashbrook is their congressperson. They are better informed without having to call the board of elections. On the other hand, if Licking County is divided between CD 10 and CD 12, and someone asks who their congressperson is, you may not be able to tell them whether it is Miller or Kasich unless you have a detailed knowledge of where they live and how that residence relates to the dividing line. They may have to call the board of elections, and their failure to do so may leave them uninformed. Most people would say the easier it is for the citizenry to be so informed of such matters the better the public interest is served.

Some would also argue that the fact that a city or county is undivided makes it more convenient for mayors and county commissioners, who this way would have only one state representative, one state senator, or one congressperson to deal with---rather than two to several. Conversely, it may be more convenient for a state representative, state senator, or congressperson to have a smaller, rather than a larger number

---

[81] H.J.R. 90 (Locker et al) 112th General Assembly (G.A.); H.J.R. 15 (Locker et al) 113th G.A.; H.J.R. 8 (Locker et al) 114th G.A.; H.J.R. 36 (Galbraith et al) 115th G.A.

of mayors and county commissioners to deal with, as would be the case if his/her constituency contained fewer county and city fragments.

Also, as we both can testify, it is easier campaigning, or managing a campaign, in a rural district when fewer counties are involved. If you have one or two townships from a county in your district, you have to recruit a volunteer from that county, or send someone to that county to get voter registration lists, the same as you would if the entire county were in the district. You have to deal with county party leaders the same way you would if the entire county were in the district. The same may be true for radio station managers and newspaper editors where such media coverage tends to coincide with county lines. You have to attend meetings of civic and political organizations whose membership coincides with that county, even though many of the persons in those organizations may not live in the part of that county that is in your district. It is less wasteful of time, money, and effort to conduct a grass-roots campaign in a district composed of a small number of whole counties than in a district containing fragments of a large number of counties. We assume that more efficient grassroots campaigning coincides with the public interest.

Beyond these considerations we see no compelling arguments against dividing cities and counties in districting plans. We agree with Lowenstein in his rebuttal of the argument that dividing such entities "dilutes" their voice in a state legislature, or in Congress. Legislators and congresspersons represent *people*----not counties and cities. And even if one argued that the *officials* who govern cities and counties would have their influence diluted in a state legislature, or in Congress, if their jurisdictions are divided between districts, it is by no means certain that such is true. As Lowenstein states:

> "Is a city more influential when a single legislator pursues its interests very intensely, or when two or more legislators pursue those interests somewhat less intensely?"[82]

---

[82]Lowenstein, *op.cit.* Note 22 at 29

People in Mansfield, Ohio were initially upset when their city was divided between the 4th and 13th districts by Ohio's 1982 CD plan. But their attitude changed when they came to realize that they now had *two* congresspersons to go to bat for them in Washington rather than just one.[83]

Lowenstein is also correct in his argument that, even if non-division of counties and cities increased their influence in legislatures or Congress, it is by no means certain that enhancing such influence is congruent with the public interest. As he says:

> "On what a priori basis can it be said that it is in the public interest to create a permanent structural advantage for one side (municipalities) in controversies involving other interests?"[84]

We agree.

Non-division of counties and cities has its pros and cons as a criterion for districting and we are not dogmatic either way. We think that, on balance, it should be included and we employ it as a criterion in the Ohio proposal **[Sections 9(B) and (D)]**. Non-division can be achieved to a greater degree if one is willing to trade-off population equality, compactness, nesting, and other criteria. Conversely, these other criteria are better optimized if non-division is downgraded. What it the proper balance? We propose one, but it really is not for scholars to say. It is a value judgment that should be made by a legislature when it is crafting a districting procedure. As with compactness, it is one of several criteria which can be used in combination to take discretion out of districting. It is the removal of that discretion that is in the public interest---not necessarily the non-division of local governmental units.

---

[83]Conversation of David L. Horn with Nancy Youd, district representative for Congressman Donald J. Pease, 6 July 1989

[84]Lowenstein, *op.cit.* Note 22 at 31

As with the compactness criterion, Lowenstein asserts that implementation of this criterion favors Republicans. As indicated earlier, we have addressed that assertion elsewhere.

5. *Non-division of "communities of interest."* Unlike the other formal criteria, this one is vague and subjective. It has been used as a synonym both for racial/ethnic groups and for "municipal corporation." We prefer to say "African-Americans" when we mean African-Americans and to say "cities" when we mean cities. Lowenstein agrees with us in that it "fares very badly under" the test of simplicity and straightforwardness.[85] David I. Wells agrees.[86] Grofman notes that most states fail to define it; that it is "hard to enforce because it is hard to define;" and that it "may conflict with the criteria of following political and other subunit boundaries."[87] We have already commented upon its translation to mean "cities" in the preceding section. Here we comment upon its translation to mean racial/ethnic groups, which we think qualifies it as a formal criterion rather than as a result-oriented criterion---as we stated above.

The first problem we face is *which* racial/ethnic groups are to be guaranteed seats in a districting plan. A quick answer might be those who qualify for protection under civil rights laws. In Ohio the only such group for whom such a guarantee is seriously advocated is the African-American community. In southwestern states the Hispanic community enjoys a similar status. But what about Jews, Asian-Americans, Native Americans, . . the gay and lesbian communities? Our position has been that it should be up to each state to decide whether, as a matter of public policy, guaranteed representation should be afforded any classification of citizens as to their race, ethnicity, religion, gender, or sexual preference. For a time it appeared that

---

[85] *Ibid.* at 32

[86] David I. Wells, Unpublished notes prepared for participation in gerrymandering panel at annual meeting of the American Political Science Assn., Chicago IL, Sept. 4, 1987. Part IV(B)

[87] Grofman, *op.cit.* Note 23 at 87

Section 2 of the Voting Rights Act of 1965 might *compel* states to guarantee representation by specifying minimum and/or maximum percentages of minority populations in specified numbers of districts. But that perception was abruptly ended when the Supreme Court reversed the district court's holding in *Quilter v. Voinovich*..[88] Speaking for a unanimous court Justice O'Connor stated:

> "Section 2 contains no per se prohibitions against particular types of districts: it says nothing about majority-minority districts, . ."[89]

If a state decides that particular classification of its citizens should be guaranteed representation in its legislature, or in its congressional delegation, it has four options:

1. By a constitutional or statutory requirement prescribing a quota of districts for the designated group, to be created by "affirmative" gerrymandering. In the case of African-Americans, for example, there might be a provision requiring that a given percentage of the districts have a minimum percentage of African-American population. There are at least four problems with this approach.

a) It is only feasible in the case of large, or geographically concentrated groups. African-Americans are the only such group in Ohio for whom this could, realistically, be done. Females and homosexuals are large groups, but they are dispersed so evenly throughout the population that no scheme of geographically-based districts could guarantee them proportional representation.

b) A possibly detrimental effect upon the representation of *other* minorities when their communities are split to create districts for the favored group. This occurred in New York in the 1970s when a Hasidic Jewish community in

---

[88] 794 F. Supp. 695

[89] *Voinovich v. Quilter* 113 S.Ct. 1149, 1156 (1993)

Brooklyn was fragmented to create a "Black" legislative district.[90]

c) Corollary to the foregoing, a backlash of feeling against the favored group upon the part of other groups. In the case of African-Americans, resentment by other ethnic groups triggered by the perception that Blacks are "again" receiving "special treatment."

d) A "boomerang" effect caused by a quota leading to the overconcentration of the favored group. In the case of African-Americans it would mean putting so many of them in one district that creation of other "Black" districts is precluded. For instance, suppose there were a requirement that Cuyahoga County must contain one CD with a 60 percent African-American population. By year 2000 that population in the county may be sufficient to create two "Black" CDs at 40 percent. But such a provision would preclude creation of that second "Black" CD. While specification of *maximum* percentages---as well as minimum percentages---might solve this problem, it is no simple matter to set the threshold percentage for the specified group that will guarantee election of "one of its own" but avoid "packing" it so that its votes are wasted. In the case of African-Americans, we noted in 1989:

> "There may not be total agreement as to where that (threshold percentage) lies. An incumbent black congressman, always nervous about his re-election chances, is liable to think that percentage should be higher than a black community leader who feels that his/her people do not have sufficient influence with white politicians in adjoining districts."[91]

2. By a proportional representation (PR) voting procedure. This is the perfect solution from a theoretical standpoint, but practical problems arise in its implementation. If PR is employed without dividing the state into districts, the

---

[90]David I. Wells, 1978. "Affirmative Gerrymandering" Compounds Districting Problems. *National Civic Review*, January: 10-18.

[91]Horn et al, *op.cit.* Note 4 at 12

problems of discriminatory districting are completely avoided and the presumably large number of seats to be filled would mean a threshold low enough that even small minorities could achieve representation in the legislative body or congressional delegation. But this would mean a "bedsheet" ballot, with a large number of candidates about most of whom the electorate would know nothing. A compromise would be to divide the state into multi-member districts within which PR elections are held. This is the solution proposed by The Center for Voting and Democracy to the problem facing the courts in *Shaw v. Reno*. The Center's proposal would elect North Carolina's twelve congresspersons from three multi-member districts, electing 3-, 4-, and 5-members each, using a semi-proportional voting procedure called "cumulative" voting.[92] A minority would have to get at least 16.7% of the vote to achieve representation in the 5-member district (20+% in the 4-member district and 25+% in the 3-member distirct). These thresholds would still enable election of two African-American congresspersons in that state. Since this compromise requires the drawing of district lines, it would still be necessary to employ a neutral procedure to insure that those lines were not drawn to give individual candidates advantages over others.[93] The relationship of multi-member districts employing PR or cumulataive voting, to other reform mechanisms is shown in Figure 1. A closer examination of PR is beyond the scope of this article. The reader is referred to a comprehensive new study of PR by one of the nation's leading authorities on the subject.[94]

3. By a system of parallel districts, as is done in electing members to the state central committees of political parties in Ohio (voters in the party primaries choose one male

---

[92]See article by Peter Applebome, The New York *Times*, Sunday April 3, 1994. (Section 4)

[93]Memorandum from David L. Horn to Professor Douglas Amy, Mt. Holyoke College, author of *Real Choices/New Voices*, March 9, 1994

[94]Douglas Amy, 1993. *Real Choices/New Voices: the Case for Proportional Representation Elections in the U.S.* New York: Columbia University Press

and one female from each CD).[95] The parliament of India has a certain number of seats for which only members of the "scheduled castes" (*i.e.*, untouchables) can run.[96] This provides an absolute guarantee of representation for this disadvantaged group. Applying the parallel district idea to congressional representation in Ohio, the state might elect one black congressman-at-large, one black congresswoman-at-large, and one white congressman and one white congresswoman in each of ten CDs having double the population of the current ones. This would be the only fair way of enforcing quotas of gender or race. It would entail three practical problems:

a) a state with a relatively small number of seats to allocate may have difficulty matching the quota percentage to an integral number of seats. Also, in the case of females whose quota would be 50%, how is an odd number of seats to be divided?

b) the disadvantage of having even larger districts---in the case of CDs it would mean populations of over one million.

c) the question of having separate electoral rolls for blacks and women in order that white males not be permitted to select the representatives of these groups.

4. By creating a larger number of smaller-sized districts to be drawn by the procedure we advocate. Whenever the size of districts is reduced it follows that the threshold, in absolute numbers, that a given group must attain to elect one of its own is correspondingly reduced. The initial versions of the Ohio anti-gerrymander amendment specified nesting of legislative and congressional districts.[97] Since there were at that time 23 CDs, and 99 Ohio house districts of

---

95 Ohio Revised Code. Section 3517.03

96 Constitution of India Part XVI Article 330 (Special Provisions Relating to Certain Classes)

97 H.J.R. 90, etc. *op.cit.* Note 81

107,000 population, the proposal implied going to a 138-member house having districts of 77,000 population. It would have, obviously, been easier for any geographically concentrated minority to achieve better representation under this scheme than under the current one. This is an alternative that might be seriously explored by California. With its 29 million population it has one of the smallest legislatures in the nation: 40 senators and 80 assemblypersons. Assembly districts have 357,000 populations; senatorial districts 714,000 populations. It would make much more sense for this gargantuan state to have a 300-member assembly, with districts of only 95,000 (which would *still* be larger than those of 46 states!). This most ethnically diverse state might get a legislature that looked more like a cross-section of its population. Because of the dispersal of its large Hispanic population that community could achieve better representation in a 300-member California assembly without resorting to districts of low compactness.

We have dealt at length with alternative approaches to this problem because a mechanical districting procedure is sometimes attacked as being insensitive to minority representation. We hope to have convinced such critics that there are devices for addressing this issue in states where it may be a problem. In Ohio the only significant, geographically concentrated minority is African-American. While our studies indicate that its geographical distribution is such that it need not fear significantly-less-than-proportional representation if a mechanical, color-blind procedure is employed to draw the current number of districts,[98] we have incorporated a "permissive" clause into the current draft of the amendment **[Sec. 8(E)]**.

This clause would permit the legislature to enact a statute that would "specify minimum and maximum percentages of minority populations for specified numbers of . . districts." In the next section we will explain how we reconcile this added constraint with the other criteria.

---

[98]David L. Horn, 1985. "Likely Impact of Neutral Districting Procedures upon African-American Representation in the Ohio General Assembly and in the Ohio Delegation to Congress" (Rev. 1985) (unpublished typescript)

Affirmance of the *Quilter* decision would have made Section 8(E) mandatory. But *Voinovich v. Quilter* reversed *Quilter v. Voinovich*, and *Shaw v. Reno*[99] might go even further, rendering a statute enacted pursuant to 8(E) unconstitutional.

We need not speculate on the ultimate disposition of the issues raised in *Shaw* to observe that 8(E) gives us flexibility: if a statute enacted pursuant to 8(E) is constitutional, then a new constraint can be added to the procedure that would, presumably, enhance minority representation; if a statute enacted pursuant to 8(E) is *un*constitutional, then 8(E) becomes inoperative and we end up with a color-blind procedure.

Whatever may be the drawbacks of the four options discussed above, any of them would be far preferable to granting discretionary districting power. If minority representation is achievable by means of geographical districts, then it is achievable by means of options 1, 3, or 4 above. If it cannot be achieved by any of these devices, *it cannot be achieved by discretionary line-drawing either.* Granting discretionary power in the naive hope of achieving such ends only gives someone power to decide *which* minorities get favored treatment and *which individual candidates* within those minorities get favored treatment. Such power is pernicious.

6. *Boundary alignment; nesting; coterminality.* Grofman notes that "Ten states (actually eleven: he left out Ohio) have constitutional provisions requiring coterminality of state assembly and state senate districts; three other states customarily draw plans to achieve coterminality, even though

---

[99]Consider Justice O'Connor's statement in the majority opinion ". . we believe that reapportionment is one area in which appearances do matter. A . . plan that includes in one district individuals who belong to the same race, but who are otherwise separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.[113 S.Ct. 2816, 2827 (1993)] Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . " (113 S.Ct. 2816, 2832)

it is not constitutionally mandated."[100] No state currently mandates nesting of congressional with legislative districts although there have been two instances where this occured. Prior to 1964, California required that CDs be created from state assembly districts (ADs) within its large counties. The CDs were created by combining either two, or three, ADs.[101] This made large population differences between CDs unavoidable, so that when the courts mandated population equality for CDs the requirement had to be abandoned (assuming that the state maintained its fixed number of 80 ADs---which was not a multiple of its 38 CDs).

The other instance where nesting of legislative and congressional districts occurred was the state of Washington during the 1970s. Because of a political impasse at the time the districts had to be drawn the judiciary intervened and appointed Richard L. Morrill to draw both legislative and congressional districts.[102] The state's constitution provides for a flexible number of seats in both houses of the legislature, ranging from 63 to 99 in the house and from 21 to 49 in the senate.[103] Since Washington was allocated 7 congresspersons for the 1970s, Dr. Morrill chose to have 49 senators and 98 assemblypersons. He drew 49 senate districts, and then combined 7 senate districts to form each CD. Figure 4 shows his plan.

(Figure 4 about here)

During the 1980s, six states had numbers of congressional, senate, and house districts that were integral multiples of each other and could have implemented a policy

---

[100]Grofman, *op.cit.* Note 23 at 88

[101]See pp. 15-16 in Leroy Hardy and Alan Heslop, *The Westside Story: A Murder in Four Acts*. The Rose Institute of State and Local Government. Claremont CA. 1990.

[102]Richard L. Morrill, 1973. Ideal and Reality in Reapportionment. Annals of the Association of American Geographers, 63: 463-477.

[103]Constitution of the State of Washington, Art. XI Sec. 2

of fully nesting legislative and congressional districts.[104] What are the implications of such a criterion?

a. Public understanding. First, and most obvious, nesting appeals as a simpler, more rational arrangement than one in which house, senate, and CD lines crisscross each other. In Ohio during the 1970s one house district contained parts of four different CDs; one senate district contained parts of five different CDs. As with the argument for nondivision of counties and cities, it is easier to tell someone who their congressperson or their state senator is if the system is nested. If you knew the state representative of a citizen of Washington state during the 1970s, you could without hesitation tell that person who his state senator and congressperson were. But if a resident of Ohio house district 86 in the 1970s told you his state representative was Walter McClaskey, you could not tell him who his congressperson was unless you had a very detailed map in your brain that would enable you to tell him whether that person was Ashbrook, Brown, Devine, or Guyer.

b. Political organization. Another consequence of a fully-nested system would be a strengthening of political parties and fewer uncontested, or weakly contested, seats. An example will drive this point home. For over two decades there has been an association of party activists in southeast Ohio called the 10th Congressional District Democratic Action Club. This kind of association does not exist at the state house or state senatorial district level. No senate district was entirely contained in the 10th CD. The 17th senate district, for example, lay partly in the 10th CD and partly in the 6th CD. A particularly obnoxious (to Democrats) Republican held senate district 17 and was up for re-election in 1974. Yet nobody in the 10th District Democratic Action Club felt it was that group's responsibility to come up with a strong challenger. After all, maybe the 6th District Democratic Action Club was recruiting somebody. If the 10th CD and associated legislative districts had all been within a large urban county, one would expect that the county central committee

---

[104] Alabama: 7-35-105; Indiana: 10-50-100; Oregon: 5-30-60; Arizona: 5-30-60; Montana: 2-50-100; Rhode Island: 2-50-100.

would take care of things. But in rural areas multi-county political organizations have to be set up to recruit and support legislative and congressional candidates. In a fully nested system the congressional district organization would have no doubt as to its responsibility for the recruitment and support of legislative as well as congressional candidates.

c. Gerrymandering inhibitor. Whenever it is mandated that one set of districts is to be subdivided to form another set, a severe restriction is placed on whoever is drawing those districts. Such a restriction could be a strong inhibition on gerrymandering if districts were being drawn in a discretionary manner: whatever congressional districting scheme might yield maximum partisan advantage might not divide into a senate districting scheme that would yield maximum advantage. The senate districting scheme, in turn, might not be divisible into a house districting scheme that would yield maximum advantage. The requirement in Ohio's constitution, since 1967, that each senate district be composed of 3 house districts probably gave the Ohio Democratic Party difficulty in using its control over districting in 1971 and 1981 to devise an Ohio senate plan that would ensure its control of that body. Republicans gained control of the Ohio senate during both decades. Similarly, this nesting requirement probably gave the Ohio Republican Party difficulty in using the control over districting it gained in 1991 to devise a plan that would enable it to take over the Ohio house: they came up four seats short in the 1992 elections.

Under a mechanical districting system, in which discretion is precluded by application of other criteria, nesting assumes less importance as an anti-gerrymandering safeguard. However, it can still function in such a role when employed in conjunction with those other criteria.

d. Career ladders and congressional incumbency. The phenomenal re-election rates of incumbent congresspersons have been widely recognized and documented. In Ohio, from 1968 through 1988, of 225 incumbents[105] seeking re-election 216 were successful,

---

[105]This count excludes the single case (CD 22 in 1968) where two

making the percentage 96.0. Of the 9 who were defeated, 3 were "freshmen." If these three cases are excluded, the success rate of the others rises to 216 of 222, or 97.3%.[106] The reasons for the high incumbent re-election rates of recent years are debated.[107] Pro-incumbent gerrymandering is, arguably, one of them. Whatever may be the reasons for incumbent success the public policy question remains the same: do we want to structure the electoral system to provide more competition for incumbent congresspersons?

One good way to do it is with nesting. The original Ohio proposals would have carried the nesting of 3 house districts in one senate district one step further to nest 2 senate districts in each CD.[108] **[Sec. 3(B)]** Ohio senators have staggered 4-year terms; those from even-numbered districts being elected in presidential years; those from odd-numbered districts being elected in gubernatorial years.[109] **[Sec. 3(C)]** These proposals would have situated one even-numbered district, and one odd-numbered district, in each CD meaning that in each election one of those senators could have challenged the incumbent without giving up his/her own seat.

---

incumbents were paired and forced to run against each other.

[106] David L. Horn, unpublished research

[107] See David R. Mayhew, 1974. Congressional Elections: The Case of the Vanishing Marginals. Polity, 6: 295-317; Albert D. Cover, 1977. One Good Term Deserves Another: The Advantages of Incumbency in Congressional Elections. American Journal of Political Science, 21: 523-541; Morris P. Fiorina, 1977. The Case of the Vanishing Marginals: The Bureaucracy Did It. American Political Science Review, 71: 177-181; John A. Ferejohn, 1977. On the Decline of Competition in Congressional Elections. American Political Science Review, 71: 166-176; Albert D. Cover and David R. Mayhew, 1981. Congressional Dynamics and the Decline of Competitive Congressional Elections. In Lawrence C. Dodd and Bruce I. Oppenheimer, eds., Congress Reconsidered, Second Edition. Washington: CQ Press. These citations are not exhaustive.

[108] Those versions cited in Note 81

[109] Ohio Constitution , Article II Sec. 2 and Article XI Sections 11 and 12

In large states, where only 2 or 3 senators would be nested in a CD, the threat might be considerable. In small states, where 5 to 25 senators would be nested, the threat would be minimal. Whether such a change is desirable or undesirable depends upon one's attitude toward the question of congressional incumbency.

If one believes that congressional incumbents should have more credible competition structured into the system in the manner proposed, there is a small negative consideration offset against it. Lowenstein pointed out in his discussion of non-division of counties and cities that such a criterion favors the aspirations of mayors and county commissioners who seek higher office: their current electoral base is situated entirely within the jurisdiction in which they want to run. This gives them an advantage relative to other candidates who may not be mayors or commissioners.[110] The same would be true for nesting: a state representative or state senator running for Congress would have an increased advantage relative to a candidate who is not a state legislator.

e. Interest group organization. In one sense no political system is neutral. The way it is structured is bound to favor some interests as opposed to others. Nesting of congressional and legislative districts would make it easier for *any* organization attempting to influence legislative decisions on *both* national and state levels to group its people together and effectively mobilize them (especially, by means of phone networks) to bring constituent pressure upon elected representatives.

However, organizations or interest groups which rely more heavily upon the use of money---as opposed to grassroots organizing---to achieve their objectives would benefit very little from nesting. Nesting gives *all* groups a better opportunity to organize but it confers a greater *relative* advantage upon the money-less groups. Since such groups do not have the option of gaining influence through the well-targeted campaign contribution, the only road open to them is effective organization of their supporters. A districting system

---

[110]Lowenstein, *op.cit.* Note 22 at 31

which frustrates their organizing efforts by overlapping CD and legislative district lines tilts in favor of the moneyed groups against which they are usually arrayed.

Camus once wrote "*Not* to choose *is* to choose."[111] To leave intact a system of overlapping district boundaries is to confer a relative advantage on certain interests in the political arena, just as instituting nesting would confer a relative advantage upon others. One is truly choosing either way. Nesting implies a choice in favor of a political structure that rewards ability to mobilize people as opposed to a political structure that rewards ability to raise money.

There have been only two generic objections to nesting. The first, discussed above, is the erection of career ladders which give legislators an advantage relative to non-legislators in seeking state senatorial or congressional office. The other objection is that nesting will necessitate more division of counties and cities than would be the case where each districting system is independent of the others. If nondivision of counties and cities is very high in one's priorities one is likely to oppose nesting. A non-generic objection to nesting with CDs is that in many states it would mean going from a fixed number of state representatives and senators to one that would change whenever the decennial apportionment altered a state's number of CDs. As we have noted, states like Washington allow for a flexible number of legislators and seem no worse for it. Ohio had a flexible number of legislators from statehood until 1967. It had 30 state representatives in 1803 and had reached 137 by the time the one-person-one-vote litigation forced a radical overhaul of its districting, resulting in the current fixed number of 33 senators and 99 representatives.[112]

111

112In some states, where a change in the number of congressional seats apportioned to that state could cause a major change in the number of legislative seats due to a requirement for full nesting, there might have to be a provision to change the "multiplier" relating congressional to legislative seats. For example, suppose Indiana were to adopt a fully-nested districting scheme. It currently has 10 congressional seats, 50 senate seats, and 100 house seats. The current house/congressional multiplier is, therefore, 10. Suppose, in future decades, its congressional representation dropped to 7, forcing it to go to a 35-member senate and a 70-member house. Indiana political leaders might consider these numbers

For Ohio to return to a larger number of legislators serving smaller-sized districts would involve a choice between two schools of thought on representation. One school sees a legislator as a citizen working part-time at the capitol, for a modest salary, serving a district small enough that he/she can be in close personal contact with and do his/her own casework. The other school sees a legislator as a full-time professional receiving a substantial salary, serving a district too large for extensive personal contact. Communication and casework are facilitated by larger staffs, newsletters mailed at state expense, and local offices maintained in the district at state expense. Such state-financed services are viewed by some as contributing to incumbent advantage. New Hampshire is the paradigm of the citizen-legislator school; California is the paradigm of the professional legislator school.

In the final section we set forth two versions of the Ohio Anti-Gerrymander Amendment: the partially-nested version and the fully-nested version. In the partially-nested version **Section 1** affirms the current fixed number of 33 senate and 99 house districts. In the fully-nested version **Section 1** specifies no fixed number of house and senate districts. In **Sections 2(b)** and **2(c)** the ratios of representation for house and senate districts in the partially-nested version are derived by dividing the state population by the fixed numbers "33" and "99," respectively. In the fully-nested version they are derived by dividing by two times the number of U.S. representatives, and six times the number of U.S. representatives, respectively. In **Section 3(b)** the partially-nested version specifies the division of each *senate* district into 3 contiguous house districts. The senate districts are numbered in order of their statewide ranking by area. In

---

too small. In that case, they could write a constitutional provision stipulating that under such circumstances the multiplier would rise to 12--yielding a 42-member senate and an 84-member house. Similarly, they could stipulate a *reduction* in the multiplier if the state's congressional representation rose beyond a certain number. There is nothing sacred about the number of seats in a state legislature. Senate sizes range from 20 in Alaska to 67 in Minnesota; house sizes range from 40 in Alaska to 400 in New Hampshire

the fully-nested version **3(b)** specifies the division of each *CD* into 6 house districts which are, in turn, combined to form 2 contiguous senate districts composed of 3 house districts each. The senate districts are numbered by giving the larger (in area) within each CD an odd number, and the smaller within each CD an even number consecutive to the number of the other senate district in that CD.

A non-discretionary means of numbering senate districts is necessary because it *does* make a political difference whether a senator's district carries an even or an odd number: whether the senator runs in a gubernatorial year, or a presidential year, could mean the difference between victory and defeat. There are other differences between the partially- and fully-nested versions in the later sections dealing with procedure. Here we only point out the differences in Sections 1-3, which deal with structure.

7. *Special rules.* The Ohio constitution specifies three constraints on drawing legislative districts that we here consider under the heading "special rules." Article XI Sec. 8 states:

> "A county having at least one house . . ratio . . shall have as many house . . districts wholly within its boundary as it has whole ratios. Any fraction of the population in excess of a whole ratio (*i.e.*, the "spillover") shall be part of *only one* adjoining house . . district."

Article XI Sec. 11 applies the same rules to the formation of senate districts. Though they are combined in one paragraph, we here consider them separately.

Maximum Districts Rule. As indicated, this rule states that where a county has a population sufficient to create more than one political district the maximum number of such districts be contained within that county. The advantage of such a rule is that it makes things easier for election boards, makes for easier public understanding, and may work to assure election of more congresspersons and legislators who reflect inner-city concerns. On the other hand, imposition of this rule might work to prevent formation of more compact districts.

Spillover rule. The spillover rule is the maximum districts rule carried one step further. Under the maximum districts rule, by itself, that portion of a county not used to make up the whole districts may be used to form any number of other districts. But when the spillover rule is added that portion can be used in *only one* other district. The 1971 legislative districting plan in Ohio violated the spillover rule in that the spillover from Lake County was used to form *two* adjoining districts (HD 74 and HD 97). The person who drew that plan, Ira Gaffin, stated that it was impossible to satisfy both the spillover rule and meet the equality of population requirement---which he took, at that time, to be a ± 1% deviation.[113]

An investigation was conducted to determine whether it was possible to satisfy both the spillover rule and the Article XI Section 3 requirement specifying a maximum population variance of ± 5% between house districts.[114] It was found that it was possible to barely satisfy both requirements with a population variance of ± 5%. However, if the variance were lowered just to ± 4%, it would be impossible to adhere to the spillover rule and Gaffin's position would be vindicated.

Secondary Counties Rule. Another clause in Article XI Section 11 presented another impossible situation to the Ohio apportionment board in 1991. The clause reads:

> "Counties having less than one senate ratio . . , but at least one house ratio . . , shall be part of only one senate district."

In contrast to the situation facing Gaffin in 1971, the architects of the 1991 plan *were* able to satisfy both the population requirement and the spillover rule. However, they could not if they were to satisfy this rule, as well. They opted to violate

---

[113]Conversation between David L. Horn and Ira Gaffin, September 21, 1975

[114]David L. Horn, 1977. "Problem: Application of the 'Spillover Rule' to Legislative Districts in Northern Ohio." Prepared for ad hoc citizens group, November 17. (unpublished typescript)

the population rule by making the population of house district 68 in Geauga and northern Trumbull counties less than the minimum 5% deviation. They survived a challenge in the Ohio Supreme Court which ruled that, when districting provisions in the Ohio constitution conflicted, the apportionment board had discretion as to which provision to violate.[115]

The lesson to be learned from these episodes is that extreme care should be taken about writing such rules into constitutions. Only a stroke of population distribution luck enabled satisfaction of the spillover rule in 1971[116] and 1981. In 1991 a change in population distribution made it impossible to comply with all of these rules, even with a ± 5% variance. Similar situations are likely to occur in the future. In the current version of our proposal there are no special rules.

Employment of Formal Criteria in a Districting Procedure

Choice of an Optimizer

We stated in our preface to the section "Formal Criteria" that the "key" to using such criteria to define the best plan in a districting procedure is to employ one of them as an optimizer. We now address the question of which one. Almost any criterion may be used either as a constraint or as an optimizer, but some function better as constraints and some function better as optimizers.

Population equality can, as suggested above, function as a constraint by the device of requiring that all districts fall within a stated variance. It could be used as an optimizer by requiring that, of plans meeting all constraints, the one with the smallest deviation from the ratio of representation be chosen. Since the courts have already ruled that population variances be held below various minima, it does not seem wise to employ population equality as a criterion where, under

---

[115] *Ferguson et al v. Voinovich et al* 586 N.E. 2d 1020 (Ohio, 1992)

[116] Assuming a ± 5% population deviation was permissible

certain conditions, its optimum value may be outside court-established limits. We concluded, therefore, that it should be employed as a constraint.

Contiguity can, as suggested above, function as an optimizer if it is stated that, of plans meeting the constraints, that plan which has the smallest number of non-contiguous districts---or where non-contiguous districts are the least divided---must be chosen. The minor difficulty with this is the possibility that two or more plans may end up with the same number of non-contiguous districts---since the number of all districts is relatively small. The major difficulty with this is that most people believe *all* districts should be *completely* contiguous, and that being the case this criterion can only serve as a constraint.

Nondivision of counties and cities has a strong claim to be used as an optimizer. Used as a constraint, it can be said only that it is not permissible to divide a township, municipality, or census tract which conforms to the population limits imposed upon "building blocks" in the preceding discussion of the population equality criterion. Beyond that, it is not possible to use this criterion as a constraint without creating technical impossibilities. For example, to specify that no county be divided would make impossible the satisfaction of a population variance constraint. As alluded to earlier, the initial version of our proposal employed nondivision only as a weak constraint. We knew then that it could be employed as an optimizer by specifying that a plan with fewer county fragments was to be chosen over one with more such fragments.

It was quite possible, however, that two or more plans might contain the same number of county fragments. That impasse could be resolved by specifying that the plan with the smaller number of municipal corporation ("municipal") fragments would be chosen. If another impasse resulted, we could see no new decision rule that would not encumber the procedure with further complexity. More important, employing non-division as an optimizer would, presumably, require compactness as a constraint.

To employ compactness as a constraint would mean specifying a minimum compactness index and ruling that any plan with a district below that minimum be rejected. The problem is in choosing that minimum. Compactness indices constitute a continuum from 100 down to zero, with an infinite number of possibilities in-between. Our experience indicates that a congressional districting plan ought to achieve a minimum compactness index of 25% to 30%. But this is not much to go on. Depending upon the unpredictable factor of population distribution, which changes after each census, it may be possible to attain much higher minima than 30%. On the other hand, it may be impossible to attain a minimum of 30%. Guesswork is required. If, to play it safe, the minimum is set fairly low, and it proves easy to comply with, then considerable latitude may be afforded for gerrymandering. If, on the other hand, one tries to preclude opportunity for gerrymandering, he may set the minimum too high for attainment. There is no way to know in advance what will prove to be the proper number.

But when compactness is used as an optimizer these problems disappear. The fact that compactness values fall on a continuum, with a large number of gradations between 100 and zero, makes it very unlikely that any two plans will have the exact same minimum,[117] if the compactness index is computed to a sufficient number of places. It was hard to avoid the conclusion---in 1978---that, of the realistically possible criteria, compactness was ideally suited to be the optimizer.

Our problem in using it in this way concerned whether we really *wanted* to compute compactness values to a large number of decimal places (as suggested above). Further reflection led us to conclude that it would probably be best to consider two plans in a "dead heat" if their minimum districts had the same index when computed to 2 significant figures. Then make the choice based on the compactness of the next least compact districts, and so on, until one plan emerged as the winner **[Sec. 9(E)]**. Such procedure would give a

---

[117]For reasons we have detailed elsewhere (see Horn et al, *op.cit.* Note 68), it is better to compare plans on the basis of their *least compact* districts (principle of the highest minimum) than according to the *average* of the indices of their districts.

better overall comparison between alternative plans than one in which everything hangs on a very slight difference between the least compact districts.

The initial version of our proposal, then had no inhibition on dividing counties and cities larger than the maximum building block size, and used compactness as the single optimizer. As stated in our discussion of Formal Criterion No. 3, we altered the proposal to employ compactness both as a constraint and as the tertiary optimizer. Further studies showed that a compactness index of 30% was attainable under any population distribution, if the building blocks were below the specified maximum population. It was simply a matter of the trade-off with nondivision of counties and cities. There was no problem of setting the compactness threshold so low it would permit gerrymandering, because nondivision would still be available to eliminate discretion. Minimum county fragments was now the primary optimizer **[Sec. 9(B)]**, and minimum municipal fragments the secondary optimizer **[Sec. 9(D)]**. To deal with the earlier cited problem of two or more plans having the same number of county *and* municipal fragments, compactness was then reintroduced as the tertiary optimizer using the principle of the highest minimum **[Sec. 9(D)]**.

Our 1989 congressional districting investigation in Ohio provided evidence in support of the Niemi[118] criticism of area/perimeter-squared compactness measures cited in our discussion of Formal Criterion No. 3. It is true that an urban district with little geographic dispersion can have a low compactness index simply because of the "sawtooth edges" effect.[119] Similarly, a rural district that is quite dispersed can have a compactness index no lower than the urban district because the former follows relatively "smooth" county lines.[120] We decided that for Ohio conditions it is more important to prevent dispersed rural districts than sawtooth-

---

[118]Niemi et al, *op.cit.* Note 71

[119]*e.g.*, CDs 1 and 2 of Kenworthy Minimum Fragments and Compactness Threshold plans, Figures 3 and 5, Horn et al, *op.cit.* Note 1

[120]*e.g.*, CD 5, Figure 3, *Ibid*

edged urban districts. Accordingly, in the most recent version of our proposal, we employ a dual compactness threshold as a constraint: we set it at 30% ($A/P^2 = 0.024$) in urban areas and raised it to 37.7% ($A/P^2 = 0.030$) in rural areas **[Sec. 8(D)]**.

In concluding this discussion, one can see how we have taken a very pragmatic approach to the development of our proposal. From the beginning we have sought what is simple, sound, and workable and modified it as we learn from experience. One element, however, has never changed: there are no "judgment calls" as to which plan is chosen.

Supersession of Compactness and Contiguity Constraints

In our initial consideration of these criteria in the section on Formal Criteria, we mentioned that one or both of them might have to be overridden if the legislature, in exercising the option permitted by **Section 8(E)**, specified "minimum and maximum minority populations for specified numbers of districts". In our discussion of Formal Criterion No. 5 ("communities of interest") we stated that in this section we would "explain how we reconcile this added constraint with the other criteria". **Section 8(E)** states that if the legislature exercises its option of enacting a statute specifying such percentages, a submitted plan "need not conform" to the compactness and contiguity constraints *if supercession of these criteria is necessary* to meet the specifications of that statute.

The way to find out if such supersession *is* necessary is to see if any of the plans can meet the statutory specifications while still adhering to the contiguity and compactness constraints. If some plans can do so, while others cannot, then consideration is limited to the plans that can do so. If no plan can do so, then we abandon these constraints and proceed to determine the winner on the basis of minimum county fragments, minimum municipal fragments, etc., with this added proviso: *such supersession shall apply only to those districts formed to comply with such law*. An example will illustrate how this proviso works.

Suppose that the Ohio general assembly, pursuant to **Section 8(E)**, specified by statute that *two* CDs must have over 50% African-American population. Our research indicates that forming one such CD, in Cuyahoga County, is simple and will not violate the contiguity and compactness constraints. Formation of a second such district, however, is probably impossible if those constraints are to be adhered to. The best way to form a second such district would be to connect the black communities in Cincinnati and Dayton with an unpopulated 50-mile corridor consisting of Interstate Highway 75. This district would be very non-compact. It would be much more compact (by area/perimeter-squared formulas) if the 50-mile corridor were deleted and a non-contiguous district formed. Niemi and Brace[121] have observed that under such circumstances it makes more sense to abandon contiguity. We agree.

Suppose two plans each achieved the requisite two majority-minority CDs by formation of the district described above. Plan A has just this one non-contiguous district, with all other districts meeting the compactness and contiguity constraints. It also contains 15 county fragments. Plan B has, in addition to this non contiguous district, several *other* districts that violate the compactness and contiguity constraints. It contains only 10 county fragments. The final proviso of **Section 8(E)** would require selection of Plan A because the other non-compact/contiguous districts in Plan B were not necessitated by the minority representation statute.

Speaking for the court majority in *Shaw v. Reno*, Justice O'Connor seems at one point to say that proof of an unconstitutional racial gerrymander might exist in

> " . . a case in which a state concentrated a dispersed minority population in a single district by disregarding

---

[121] Richard G. Niemi and Kimball Brace, "Bright Lines, Guidelines, and Tradeoffs: the Conflicts between Compactness and Minority Representation in the Congressional Districts of the 1990s" Prepared for the annual meeting of the Midwest Political Science Association, Chicago, April 17, 1992. Pages 20-21 and footnote 16.

traditional districting principles such as compactness, contiguity, and respect for politica subdivisions."[122]

As noted in our reference to *Shaw* in the discussion of Formal Criterion No. 5, non-contiguous, or grossly non-compact districts drawn specifically to facilitate minority representation might be unconstitutional. Justice O'Connor seems to be saying that if specified numbers of districts, having specified ranges of minority populations, can be drawn while observing contiguity and compactness standards, such as **Sections 8(C)** and **(D)**, they are constitutional; but, if formation of such districts violates these "traditional" criteria they may not be constitutional. We will have to let the courts decide this matter. In the meantime, as noted earlier, **Section 8(E)** gives us flexibility to conform to either interpretation of the constitution.

Method of implementation.

At this point we have demonstrated how formal criteria can be employed to take discretion out of districting by defining the "best plan" in unambiguous terms and mandating that such plan be adopted. It remains for us to consider how a state might implement such a procedure. There are two general approaches which we shall label "Legislature/Commission" and "Competitive Submissions."

1. *Legislature/Commission*.. The first, and obvious, approach is to have the legislature, or a commission, draw the districting plan in a manner which ties its hands: that is, mandate that it draw a plan that fulfills all the constraints and best meets the optimizing criteria. It would not matter how a commission were made up since it would exercise no discretion. Having a mandate to draw the best plan, it would immediately be faced with the choice of attempting to draw the plan manually, or of attempting to program a computer with the criteria and have the computer search out the best plan.

Whether the legislature/commission employed a computer, or drew its plan manually, it is unlikely that it

---

[122]113 S. Ct. 2816, 2827 (1993)

would come up with the best plan. Even if it were acting in good faith, it is likely that someone could draw a plan better meeting the criteria. The legislature/commission's plan, whether conceived in good faith or treachery, would doubtless displease somebody and it would then be up to that "somebody" to prove that the commission did not draw the best plan. This he would, presumably, do by drawing an alternative plan that better satisfied the criteria, and then going to court with a lawsuit to replace the legislature/commission's plan with his own.

This is not a very satisfactory process, since it guarantees what will certainly be costly---and presumably, lengthy---litigation every time districts need to be drawn. It means, further, that only persons or groups with the financial resources to wage lawsuits can seriously participate in the districting process.

In this age of "high tech" there is a popular notion that computers can do anything. Of the seven individuals who claim authorship of this proposal, two hold doctorates in mathematics, a third teaches the use of computers in business and accounting, and a fourth is an engineer who uses a computer in his work. They are unanimous in their judgment that attempting use of a computer to *draw* a districting plan where 4,300 building blocks are involved would be an exceedingly costly and impractical endeavor. To go into a discussion of all the technical complexities involved in developing the program is beyond the scope of this article. There is simply no point in going to all the trouble and expense of trying to develop such a program.

If we reject a state-funded computer search for the best plan, we are thrown back on manually-drawn plans. As we have observed, the legislature or a commission can only be "forced" to draw the best plan by the threat of somebody with an alternative plan challenging the state's plan in court. Is there a way to avoid this certainty of litigation? The way that seems logical to us is to open the process to the public at the *outset, without* the necessity of court action---rather than *after* the state has acted, and then only *by* court action.

2. *Competitive submissions.* To open the process in such manner would employ what we have labeled "competitive submissions." Once the official data on populations, areas, and perimeters was published any person could take this data, construct a plan with it, and submit it to the districting authority. That authority could be any number of state officials or bodies. It would not matter who it was, since the procedure, being cut-and-dried, would tie the hands of whoever administers it. Our choice would be the secretary of state **[Sec. 6(B)]**, who already serves as the state's chief elections officer. Although a partisan, he is allowed to oversee all elections in the state because his actions are governed by clear, detailed rules. His actions would be similarly governed were he to administer the districting process. In fact, he would probably contract much of the work to consulting engineers.

The winning plan in a competitive submissions procedure will, obviously, displease somebody also. But now the process would be an open one in which all the alternative plans submitted would be known to, and probably published in, the media. The authors of losing plans would know what other plans were considered and why their plans lost out. Anyone who wished to employ a computer to make his plan would be free to do so---but at his/her own expense. The winning plan might be challenged in court; but in this case the argument, rather than being over what the "intent" of a commission had been, would be simply one of what is the correct sum of a column of numbers. Attorneys do not get rich litigating such questions.

Competitive submissions is, admittedly, an unconventional approach to districting. Significantly, however, we are not alone in reaching the conclusion that it is the best approach. Norman Primus, a districting consultant and reformer with over 15 years' experience, arrived at the same conclusion, independently. His 1985 Indiana districting competition, even without the resources of the state available to provide the best database, still demonstrated the workability of this approach.

Sherlock Holmes once said " . . when you have eliminated the impossible, whatever remains, *however*

improbable, must be the truth.[123] Once we have ruled out the unsound and the unworkable approaches to districting, then whatever approach remains, however unconventional, is the one to take.

Commentary on Other Provisions

Section 4 simply affirms that plans are to consist of single-member districts.

Section 5 applies to districts that may be described in terms of the municipal corporations contained in them: the boundaries of such districts are not to be altered should the boundaries of their municipal corporations change. For example, suppose a district line separated District A in western Cincinnati from District B in adjoining Green township. During the ensuing decade the city annexed part of the township. By this provision the annexation would remain as part of District B, and not be transferred to District A.

Section 6(A) defines various terms employed in the procedure, including the formula employed in computing the compactness ratios of districts. The rationale for **Division (A)(5)(d)** is given elsewhere.[124] **Division (B)** commences description of how the secretary of state would actually conduct a competitive submissions districting procedure. He begins, on May 1, by issuing an invitation to parties wishing to submit plans and requiring them to file a notice of intent, accompanied by a fee, within two weeks. This enables the secretary to estimate how many copies of the districting database will have to be printed. The filing fee helps defray the cost of the necessary documents and serves to screen out frivolous entries.

Section 6(C) sets June 1 as the day on which the secretary of state issues the documents necessary for competitors to draw their plans. We have already argued the rationale for a catalogue of district "building blocks" and given

---

[123]Sir Arthur Conan Doyle, *The Sign of Four* Chapter VI

[124]Horn et al *op.cit.* Note 68 page 117

an idea of what it might look like in Figure 1. The maximum building block population is also stated. That of the partially-nested version differs from that of the fully-nested version. The rationale for the maximum-sized building block in the fully-nested version involves mathematical reasoning we have set forth elsewhere.[125]

It is quite likely that some of the townships, census tracts, and block numbering areas used as raw data by the secretary of state will have populations exceeding the maximum allowable. Some census tracts also include portions of more than one municipal corporation.[126] In such cases **Section 6(D)** directs the secretary of state to divide these entities into "the fewest possible units of contiguous territory containing populations not exceeding the threshold or containing parts of more than one municipal corporation." Usually, there are many ways such divisions can be made and the secretary could exercise discretion as to how he did it, because such discretion poses no real opportunity for political manipulation. However, when a proposal somewhat similar to ours was placed on the statewide Ohio ballot by initiative petition in 1981, the alleged ability of the person preparing the database to manipulate the districting outcome by the way he divided "oversize" census tracts was a point of major controversy.[127] Therefore, we have included language directing the secretary to "make the divisions resulting in the most compact units . . " Guidance is thus provided to the secretary so that, if he makes a reasonable effort to achieve the "most compact units," it is very unlikely anybody will make this an issue. Since minimizing division of municipal corporations is an important criterion in our procedure, it is

---

[125]David L. Horn, 1978. "The Mechanics of a 'Competitive Submissions' Procedure for Political Districting" pp. 3-4. (unpublished typescript)

[126]For example, Tract 69.50 in the 1980 census for Franklin County, Ohio contains fragments of Perry Township, Sharon Township, and the municipal corporations of Columbus and Worthington: four different jurisdictions. This instance is not unique.

[127]Horn, David L. 1992. "Ohio" in Leroy Hardy, Alan Heslop, and George Blair ed., *Redistricting in the 1980s* The Rose Institute of State and Local Government, Claremont California (pg. 200)

essential that achievement of minimal division not be hindered by building blocks containing parts of more than one such jurisdiction. Therefore, if a census tract contains parts of more than one municipal corporation, it must be divided even if its population is below the threshold.

In our discussion of the compactness criterion preceding Figure (1) we stated that the engineering firm making the area and perimeter measurements to go into a catalogue of district building blocks "could use judgment and discretion as to the degree of precision employed, because whatever figures it came up with, regardless of how close or not close to the 'true' values, would have to be used by everybody." **Section 6(E)** simply recognizes this fact and forestalls controversy and nit-picking by stating that such measurements "shall be presumed to be accurate." With respect to the precision of perimeter segment measurements, we would recommend that they be made to the nearest 0.01 kilometer. That would be about 33 feet, or about the width of a small street.

Our research, based upon Ohio conditions, indicates that the database (*i.e.*, the "catalogue of building blocks," plus forms and an assortment of base maps) discussed in this section would contain about 4,300 building blocks. To prepare it would first require splitting about 600 oversize census tracts, or tracts containing parts of more than one municipal corporation. We estimate the time required to do this as about 200 hours. Measurement of areas and perimeters of all 4,300 building blocks might take another 1450 hours. Preparation of the "catalogue" (which we estimate would come to about 500 pages), forms, and base maps might take about 960 hours. Consequently, we estimate the total required time to be about 2,600 hours. If we apply a "safety factor" of about 1.5, the time required for the secretary of state to prepare the database would rise to 4,000 hours. Multiply this by whatever hourly rate seems reasonable to arrive at the cost.

The maximum time required---and the maximum cost---would occur the first time the database is prepared. Because the configurations of many of the township and census tract building blocks will not change from decade to decade, their

areas and perimeters would not have to be re-measured, thus leading to significant cost savings in subsequent decades.

Section 7 begins by stating that each plan submitted in response to the invitation extended in **Section 6(B)** must cover the entire state. In the case of the partially-nested version we are talking about either congressional or senate plans; in the case of the fully-nested version we mean only congressional plans. We make this stipulation because many participants are interested only in the configuration of a particular district---or group of districts---and if allowed to do so would submit a plan covering only the part of the state that concerns them. This is unacceptable because the state requires a plan for *all* of the districts, and the way a particular district is configured imposes limitations upon what can be achieved with respect to all the others. We are picking the best *statewide* plan. We cannot achieve that plan by adding together plans for individual districts.

Section 7 continues by requiring that each plan include a summary sheet listing the populations and compactness ratios of all of its districts, the identities of all counties and municipal corporations that are split, and the number of fragments resulting from these splits. Further, the participant is to include a statement affirming that the plan conforms to all of the constraints enumerated in **Section 8**. The feature of a summary sheet requiring this information first appeared in H.J.R. 33 and S.J.R. 30, the versions that were introduced in the 116th general assembly in 1985. Prior versions had burdened the secretary of state with making the compactness measurements for all of the plans, himself. As will shortly become apparent, this burden in unnecessary.

Finally, **Section 7** gives participants just 30 days in which to prepare their plans by requiring a July 1 submission deadline. Based upon our experience, this time is ample. After the submission deadline, all plans become available for public examination. This is an imperative feature of the process. It ensures meticulous verification and generates public confidence that everything is open and aboveboard.

Section 8 specifies the four or five constraints which all plans submitted pursuant to Section 6 must satisfy.

Division (A) affirms the population equality requirements already considered in our discussion of Section 3. **Divisions (B), (C),** and **(D)** affirm the constraints of building block integrity, contiguity, and compactness discussed previously. **Division (E)** is the permissive clause which, if acted upon, would add a fifth constraint regarding minimum and maximum minority populations for specified numbers of districts. We have discussed its implications at length.

Section 9 describes the process by which the secretary of state determines the winning plan from among those plans which meet the constraints enumerated in Section 8. Under the partially-nested version **Division (A)** calls for concurrent selection of the best congressional plan and the best senate plan. Under the fully-nested version division (A) only calls for the selection of the best congressional plan.

Division (B) instructs the secretary to examine the summary sheets of all the plans, and on the basis of this survey find out if any plan has fewer county fragments than the others. If such is the case, then the winning plan is very quickly established on the basis of the primary optimizer: county fragments. Then the secretary must make a detailed examination of this plan to see if it does, indeed, meet all the constraints and that what is claimed on its summary sheet is true and correct. If so, the secretary, by August 15, is to declare this plan as the winner. In the partially-nested version this is done for both the congressional and senate plans. In the fully-nested version this is done only for the congressional plan. Finally, the secretary must publish for public distribution the maps and detailed descriptions of these winning plans because this information is necessary for competitors to participate in the next stage of the competition. In the partially-nested version this distribution will apply only to the senate plan.

Division (C) prescribes what is to be done if examination of the supporting documents of the apparent winner fails to verify what is claimed on its summary sheet: that plan is disqualified and a new apparent winner is determined from among the remaining plans. The verification procedure of **Division (B)** is again followed. If a second

disqualification results, the procedure is repeated until a bona fide winner is established. We have estimated that it should take approximately 25 hours to completely check a senate plan of 33 districts. This means that, if the summary sheet of the apparent winner is true and correct, no other plans have to be checked and a process w[illegible]ave allowed six weeks to complete could be finished in a few days. As we noted in the discussion of Section 7, the earlier versions of our proposal called for the secretary of state to check *all* of the plans. It took us about seven years to realize that such a large expenditure of time and money could be made completely unnecessary by employment of a summary sheet.

Division (D) prescribes what is to be done if two or more qualifying plans each contain the fewest county fragments and the winner cannot be determined on the basis of the primary optimizer---which is very likely to be the case. We then determine, among the plans which finished in a "dead heat" on the basis of their county fragments, which one contains the fewest municipal fragments. If one plan has fewer municipal fragments than the others, we then have an apparent winner on the basis of the secondary optimizer and again follow the verification procedure of **Division (B)**. If two or more plans end up in a "dead heat" on the basis of the secondary optimizer---which is likely to be the case if a large number of plans are submitted---we must then resort to the tertiary optimizer: compactness. Compactness was initially used as a constraint to weed out plans which might split very few counties and cities, but were not sufficiently compact. Now we return to this criterion to make the final determination. Here we compare the compactness of plans according to the principle of the highest minimum which we have discussed elsewhere.[128]

The rationale for **Division (E)** was given during our consideration of compactness in the section discussing choice of an optimizer. Availability of the decision rule given in this division means that it will always be possible to resolve a deadlock between two plans---unless they turn out to be

---

[128]See Horn et al, *op. cit.* Note 68, pp. 111-112

identical, which would be entirely possible if a large number of plans is submitted.

Division (F) was included to make it clear that plans are not to be disqualified because of "minor technical errors that have no substantive effect." A court interpretation of this provision might be necessary in some situations and we do not like to use language that might require court interpretation. But to omit this provision would be an even less satisfactory alternative. The key word is "substantive." By that we mean something that could make the difference as to whether a plan is selected.

Section 10 lays out the procedure to be followed during the second phase of the competition under the partially-nested version; and the second and third phases under the fully-nested version.

Division (A) instructs the secretary of state, at the time he announces the winning congressional/senate plans, to invite persons to submit plans for house of representatives ("house") districts. In the case of the partially-nested version the competitors may divide any number of districts in the senate plan, each into three house districts. In the fully-nested version the competitors may divide any number of districts in the congressional plan, each into six house districts. In this stage of the competition it is not necessary to require that submitted plans cover the entire state because each congressional/senate district is self-contained and how it is divided does not affect how other congressional/senate districts can be divided. The secretary furnishes competitors with the documents described in **Sections 6(C)** and **9(B)** in return for a modest filing fee, contingent upon the number of districts the competitor intends to divide. Competitors are, once again, given a month in which to prepare their plans with a new deadline of September 15.

Division (B) sets November 1 as the date for the secretary of state to announce the winning house plans, based upon the division of senate districts in the partially-nested version; based upon the division of congressional districts in the case of the fully-nested version. The selection procedure is the same as that given in sections 8 and 9 except that,

instead of one competition covering the entire, state there are "mini-competitions."

In the partially-nested version there will be competitions in each of the senate districts---33 in all. The resulting statewide plan will very likely be a composite of the winning plans of different competitors in different senate districts. It is unlikely that a single individual would come up with the winning plan for the division of all 33 districts. In the fully-nested version there will be competitions in each of the congressional districts---currently 19 in Ohio. The resulting statewide plan will, very likely, also be a composite of the winning plans of different competitors in different CDs.

For the partially-nested version all districting plans are, therefore, in place by November 1. For the fully-nested version, however, a third and final phase is necessary: the recombination of house districts within each CD to form the senate districts. Division (B), therefore, includes additional language governing this phase. A public competition is not necessary to arrive at the combination of six house districts within each CD that best satisfies the requirements of Sections 8 and 9 because the number of such combinations is small. The possible number of combinations of 6 things, taken 3 at a time, is only 20---in fact 10, since 10 of the combinations are complements of the other 10. Of these 10, it is quite likely that as many as seven may result in one or both of the senate districts being non-contiguous.[129] Therefore, the real options are likely to be about three. In this situation it is safe to let the secretary of state designate the winning combination. To "keep him honest" division (B) requires him to "publish the computations he used in determining the compactness of the various combinations." This makes it very easy for the press and public to look over his shoulder. The language of this division gives him a month to make this choice, but it is quite likely that he could do it in a day. With the data available to everybody, the winning plan for senate districts will probably be figured out in a day or two by the press and political community. The secretary of state's official announcement on December 1 will probably be an anticlimactic formality.

---

[129]See example given in David L. Horn, *op.cit.* Note 125, pp. 17-19

Division (C) was written because what number is given to a congressional district has political consequences---although not nearly so grave as in the case of senate districts. Rules pertaining to the use of the congressional franking privilege are tied to the number given the district. We discovered this fact several years ago when one of our collaborators got a phone call from a distressed congressional incumbent after seeing the number given to "his" district in a demonstration plan drawn by the senior author for submission to a federal court.[130] We, therefore, need an impartial procedure for numbering congressional districts; but it is not something that should take up space in a state constitution. Consequently, we direct the legislature to specify such a procedure by statute. Numbering of Ohio house districts does not, at this point, have political consequences, but it seems reasonable to take discretion out of this matter as well.

Division (D) authorizes the legislature to adjust the various deadlines specified in Sections 6, 7, 9, and 10 if practical experience with availability of census data, time required to process plans, filing dates for primary elections, or other factors make it evident that such adjustment is warranted. It also authorizes the adjustment of filing fees to account for inflation.

Section 11 deals with the problem of holdover senators. If state senators have staggered 4-year terms it means that, anytime redistricting occurs, half of those senators will be halfway through their terms. The instructions given by this section ensure continuity for holdover senators when possible, and when not possible provide an impartial mechanism for resolving conflicts.

Section 12 provides an expeditious mechanism for litigating controversies involving legislative districting done by this procedure. It does not apply to controversies involving congressional districting done by this procedure. Such jurisdiction lies with the federal courts and no state constitution can regulate the procedures of federal courts.

---

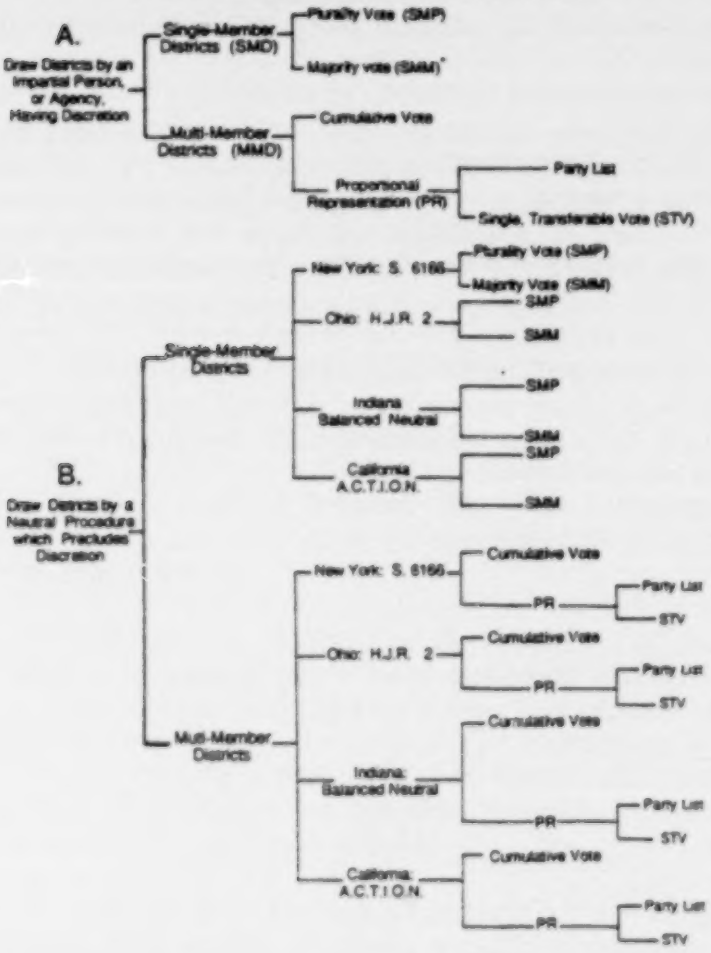
[130]Private conversation between Benson A. Wolman, Executive Director, American Civil Liberties Union of Ohio and U.S. Rep. Chalmers Wylie as reported by former to David L. Horn, October 1983

Section 13 states how long the boundaries of existing districts are to remain in effect. As currently drafted, the Ohio Anti-Gerrymander Amendment would not take effect until the redistricting slated to occur in the year 2001. We have set its effective date that far into the future because the proposal has a better chance of being judged on its merits if it cannot be known which political party would benefit by its adoption.

Section 14 , the severability clause, is to protect the integrity of the Amendment in the event that any of its provisions is voided by a court ruling. We have speculated as to the constitutionality of **Section 8(E)**. If that section were voided, this section ensures that the other sections would stand.

Figure 1

ALTERNATIVE WAYS OF IMPLEMENTING A CONSTITUTIONALLY-MANDATED NEUTRALITY PRINCIPLE IN POLITICAL DISTRICTING



* A majority vote within a single-member district can be obtained by employing a Majority Preferential voting system. This is also called the Alternative Vote.

Figure 2

POLITICAL DISTRICT BUILDING BLOCKS: MAHONING COUNTY Page 50-2

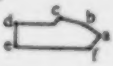
	Population	Area km²	Perimeter, km a-b	b-c	c-d	d-e	e-f	f-g	g-h	h-a
City of Campbell (12, 577)										
Tract 8101	5,574	4.81	3.12	3.25	0.12	1.83	0.77	(f-a) 1.68		
Tract 8102	2,895	5.02	=f-a 8101 1.68	1.71	0.66	0.62	1.01	2.26	2.18	2.41
Tract 8103	2,230	1.45	=b-c 8102 1.71	0.98	(c-a) 0.79					
Tract 8104	1,878	0.92	=b-c 8103 0.98	=c-d 8102 0.66	1.03	(d-a) =d-e 8101 1.83				
City of Struthers (15, 343)										
Tract 8105	1,048	3.27	=c-d 8101 0.12	=c-d 8104 1.03	0.82	2.74	0.64	1.78	(g-a) 1.04	
Tract 8106 	4,096	2.73	=c-d 8105 0.82	=e-f 8102 1.01	1.75	0.85	2.43	(f-a) 0.59		
Tract 8107	8,047	4.16	=e-f 8106 2.43	0.50	0.48	3.05	1.20	(f-a) 2.03		
Tract 8108	2,152	3.14	=f-a 8106 0.59	=f-a 8107 2.03	0.95	2.56	0.18	(f-a) =d-e 8105 2.74		
City of Lowellville										
Tract 8111	1,836	4.56	4.05	=e-f 8105 0.64	=e-f 8108 0.18	(d-a) 5.58				

Figure 3a. HD 25.
C.I. =23.2%

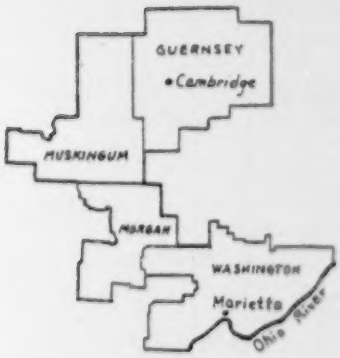


Figure 3b. HD 95.
C.I. = 18.5%

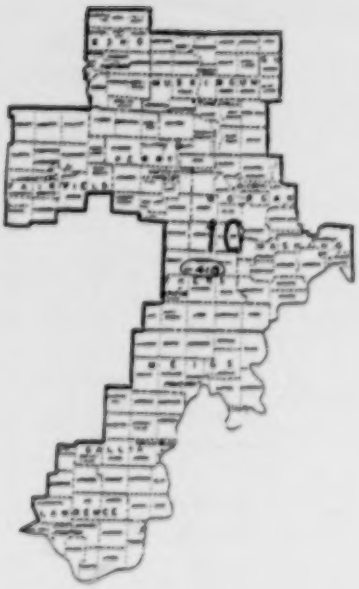


Figure 3c. CD 10.
C.I. = 23.9%

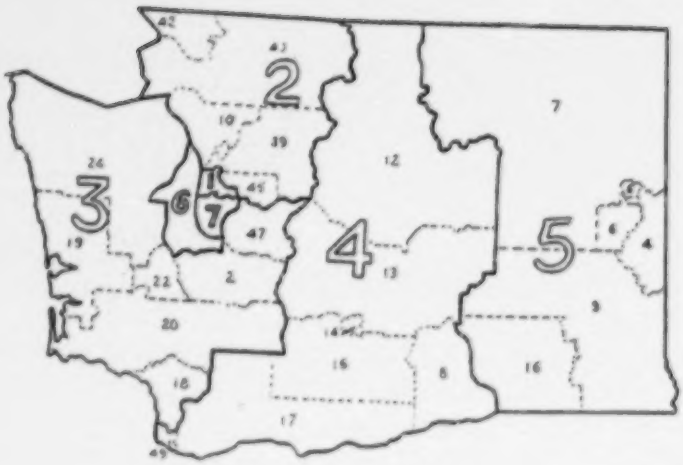


Figure 4. 1970s Washington Congressional and State Senatorial Districts

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

No. 96-471

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CLARENCE MILLER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO DISMISS OR TO AFFIRM

BETTY D. MONTGOMERY
Ohio Attorney General

DIANE R. RICHARDS
Counsel of Record
Section Chief, Chief Counsel's Staff
CATHERINE P. PALAZZOLO
Assistant Attorney General
JEFFREY S. SUTTON
State Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-2872/(614) 728-7592 [fax]
Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Relevant Facts Relied Upon By Ohio In This Motion . . 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Ohio's Congressional Redistricting Plan Does Not Violate The "One Person, One Vote" Principle Of *Wesberry v. Sanders*, 376 U.S. 1 (1964) 7

A. Alleged Population Variations In Ohio's Congressional Districts Are Not A "Significant Variance Between Districts" Sufficient To Shift The Burden Of Proof To The State To Justify Any Alleged Discrepancy 7

B. Even If The Alleged Population Discrepancies Are Significant Enough To Shift The Burden To Ohio To Justify The Variations, The Allegations In Appellants' Complaint Provide Justifications Which This Court Has Recognized As Valid Reasons For Population Variations Among Districts 11

C. Appellants Do Not Seek The Remedy Provided Under Existing Law For A Violation Of The "One Person, One Vote" Principle In Any Event, And For This Reason Also, The Dismissal Of Their Claims Should Be Affirmed . . 14

II. Appellants' "Bipartisan Gerrymandering" Claim Is Without Legal Basis And Was Properly Rejected By The District Court 15

A. The Remedy Appellants Seek Disregards This Court's Precedents Which Recognize That The States Have Primary Responsibility For Redistricting 15

B. *Gaffney v. Cummings*, 412 U.S. 735 (1973), Defeats Appellants' "Bipartisan Political Gerrymandering" Claim 17

C. Appellants Eschew Reliance Upon *Davis v. Bandemer*, 478 U.S. 109 (1986), And That Case Lends No Support To Their Claims In Any Event 19

1. The Complaint Fails To Allege Intentional Discrimination Against Identified Groups Of Which Appellants Are Members 20

2. Appellants' Complaint Fails To Allege The Requisite Discriminatory Effect Demanded By *Bandemer* 22

III. There Is No General Constitutional Principle Of "Governmental Neutrality" That Would Create The Right Urged By Appellants 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws,
781 F. Supp. 394 (D. Md. 1991),
aff'd mem., 504 U.S. 938 (1992) . 10, 12, 13, 24

Arizonans For Fair Representation v. Symington,
828 F. Supp. 684 (D. Ariz. 1992),
aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans For Fair Representation,
507 U.S. 981 (1993) 12

Badham v. March Fong Eu,
694 F. Supp. 664 (N.D. Cal. 1988),
aff'd mem., 488 U.S. 1024 (1989) 15, 24

Burns v. Richardson,
384 U.S. 73 (1966) 12

Bush v. Vera,
__ U.S. __, 116 S.Ct. 1941,
135 L.Ed.2d 248 (1996) 19

Davis v. Bandemer,
478 U.S. 109 (1986) . . . 6, 19, 20, 21, 22, 23, 24

Edelman v. Jordan,
415 U.S. 651 (1974) 10

Gaffney v. Cummings,
412 U.S. 735 (1973) 6, 12, 16, 17, 18, 19, 21, 25

Growe v. Emison,
507 U.S. 25 (1993) 6, 16

Hastert v. State Board of Elections,
777 F. Supp. 634 (N.D. Ill. 1991) 12

Holloway v. Hechler,
817 F. Supp. 617 (S.D. W.Va. 1992),
aff'd mem., 507 U.S. 956 (1993) 24

Karcher v. Daggett,
462 U.S. 725 (1983) . . . . . passim

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 9

Mahan v. Howell,
410 U.S. 315 (1975) 15

Mandel v. Bradley,
432 U.S. 173 (1977) 10

Marks v. United States,
430 U.S. 188 (1977) 20

Michael H. v. Gerald D.,
491 U.S. 110 (1991) 7, 25

Moore v. East Cleveland,
431 U.S. 494 (1977) 25

Personnel Administrator of Massachusetts v. Feeney,
442 U.S. 256 (1979) 6, 22

Pope v. Blue,
809 F. Supp. 392 (W.D.N.C. 1992),
aff'd mem., 506 U.S. 801 (1992) 15, 17, 24

Reynolds v. Sims,
377 U.S. 533 (1964) 16

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 14

Stone v. Hechler,
782 F. Supp. 1116 (N.D. W.Va. 1992) 10

Voinovich v. Quilter,
507 U.S. 147 (1993) 16

Wesberry v. Sanders,
376 U.S. 1 (1964) 7, 9

Whitcomb v. Chavis,
403 U.S. 124 (1971) 22

White v. Weiser,
412 U.S. 783 (1973) 5, 12, 16, 19, 25

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Article I, §2 8

O.R.C. §3501.01(F) 3

O.R.C. §3517.01 . . . . . 3, 4, 23

O.R.C. §3521.01 2

OTHER AUTHORITIES

Supreme Court Rule 18.6 1

Pursuant to Supreme Court Rule 18.6, Appellees Robert Taft, II, Secretary of State, George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, Vernal G. Riffe, Jr., former Speaker of the Ohio House of Representatives, Ohio State Senator Eugene J. Watts, Ohio Representative William J. Healey, Ohio Senators Richard H. Finan, Robert J. Boggs, Alan Zaleski, former Ohio Senator Betty Montgomery, now retired Ohio Senator Barry Levey, Ohio Representative Robert Corbin, and former Ohio Representatives Judy B. Sheerer (current Ohio Senator), Michael P. Stinziano, and retired Ohio Representatives William L. Mallory and Corwin Nixon, all in their official capacities, and the State of Ohio (hereinafter referred to collectively as "Ohio") move to dismiss this appeal, or in the alternative, to affirm the judgment sought to be reviewed on the ground that the questions on which the decision on the cause depends are so unsubstantial as not to need further argument. The unpublished decision entered below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Ohio will not reiterate here the procedural history of this case or recite at length the allegations of Appellants' complaint in the district court, which are included in Appellants' jurisdictional statement.

Relevant Facts Relied Upon By Ohio In This Motion

This appeal involves a constitutional challenge to the congressional districting plan for Ohio which was enacted after the 1990 census. As a result of the 1990 census, Ohio lost two seats in the United States House of Representatives.

The Ohio congressional delegation accordingly decreased in size from twenty-one to nineteen. Complaint at ¶¶19 and 20, Appellants' Jurisdictional Statement (hereinafter "Jur. St.") at A-30. Thus, in accordance with longstanding historical practice, the Ohio General Assembly redistricted the state's congressional districts. According to Appellants' complaint, a ten-member bipartisan commission made up of then members of the Ohio House of Representatives and Ohio Senate drafted the redistricting plan. Complaint ¶26, Jur. St. at A-32. Ohio's Congressional Redistricting Plan is found at Ohio Revised Code ("O.R.C.") §3521.01 (effective March 27, 1992).

Appellants' complaint in the district court alleged that the redistricting plan resulted in nineteen districts, several of which had maximum population variances of +2 to -7 persons from exact numerical equality. Complaint at ¶28, Jur. St. at A-33.[1] Ohio submits that such a minute deviation from exact equality in population itself demonstrates Ohio's good faith in attempting to achieve equipopulous districts. Additionally, Appellants' complaint alleged legitimate

---

[1]Appellants' 42-page complaint does not include the "ideal" district size, the number of Ohio districts which are exactly equal to that ideal, or the largest variation in terms of percent, even though these are the facts usually used by plaintiffs to buttress their claims of mathematical inequality. *Cf.* Jur. St. at 7, n.15. Nonetheless, it is possible to calculate the percentage of the maximum variation by using the one district size provided in Attachment 3 to the complaint. That attachment states that the size of new district 6 is 570,901. Jur. St. at A-63. Since Appellants also alleged that the greatest variation is nine people, all of the districts must be between 570,910 and 570,892 people in size. Nine divided by either of these numbers is less than 0.000016. Therefore, the maximum deviation of any district from the ideal district is at most 0.0016% according to the allegations of the complaint.

justifications for the variances, as recognized in established United States Supreme Court case law.

Appellants in this case are a former Republican Congressman, Clarence Miller, six unsuccessful Ohio Republican and Democratic candidates for Congress, including two persons who, according to the complaint, last ran for Congress in 1980 and 1984 respectively (Appellants Hollister and Grote), the Libertarian Party of Ohio, and an Ohio independent voter (Diana Kukor) whose district of residence is not alleged in the complaint. *See* Complaint at ¶¶1-9, Jur. St. at A-24, A-25. The complaint alleges that the Libertarian Party of Ohio is an organized, but not state-recognized, political party in Ohio. Complaint at ¶6, Jur. St. at A-25.[2] The complaint does not allege whether the small

---

[2]A recognized political party in Ohio is "any group of voters meeting the requirements set forth in section 3517.01 of the [Ohio] Revised Code for formation and existence of a political party." O.R.C. §3501.01(F). In order to qualify as a political party under O.R.C. §3517.01, a group of voters must have:

> at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of

number of Ohioans who comprise the Libertarian Party reside in proximity to one another.

Appellants asserted in their complaint below that the new districting plan resulted from practices of both major political parties to enhance the re-election chances of incumbent congressional representatives of both parties (what Appellants termed "bipartisan gerrymandering"). One of the facts alleged by Appellants was that in 1992, Appellant Clarence Miller lost in the Republican primary (in Ohio's 6th congressional district) by a "razor-thin margin." *See* Complaint at ¶41, Jur. St. at A-37. As the district court correctly observed, rather than indicating that the congressional districts were so skewed that the General Assembly was able to pick the candidates for election, this allegation signifies that the people in fact had not been divested of their ability to choose their congressional representatives.

As these facts show, this appeal should be dismissed or the district court's judgment should be affirmed because the decision to dismiss the case was correct and in accordance with this Court's controlling precedents. Appellants' complaint failed to state a constitutional claim and, indeed, the allegations of the complaint *support* Ohio's position that the state's congressional districts are constitutionally valid. Thus, taking the facts alleged in Appellant's complaint to be true for the purposes of Ohio's

---

> filing.... If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

O.R.C. §3517.01(A).

motion to dismiss, the district court properly dismissed this case for failure to state a cognizable constitutional claim.

SUMMARY OF ARGUMENT

Appellants' argument that the alleged maximum deviation from the ideal district size in actual numbers (not percentages) of +2 to -7 individuals in several of Ohio's congressional districts prevented dismissal of Appellants' complaint (*see* Jur. St. at 23) suffers from several defects. First, viewed in light of the differences between the largest and smallest districts in cases such as *Karcher v. Daggett*, 462 U.S. 725 (1983) (3,674 persons), the district court correctly concluded that the maximum difference of nine persons alleged in the instant suit is indeed "minuscule" and constitutionally insignificant. The nine-person difference is so small as to be attributable entirely to computer or human error and thus is entirely consistent with the conclusion that the State here acted in good faith to attempt to reach precise mathematical equality.

Second, in the event that even such infinitesimal population discrepancies require justification under *Karcher*, *supra*, the allegations of Appellants' own complaint that the Ohio General Assembly drew congressional districts which protected almost all of the incumbents and which attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats, provided sufficient justification for the tiny deviations from exact numerical equality at issue here. *See Karcher*, 462 U.S. at 741; *accord*, *White v. Weiser*, 412 U.S. 783, 797 (1973).

Third, Appellants do not seek the only remedy that would be available under *Karcher v. Daggett*, *supra*, for such a population variance -- a plan with precise mathematical equality. *See* Transcript of Oral Argument

before the District Court, at p. 30, Appendix to Appellees' Motion at A-3. For this reason also, the district court's judgment in this case should be summarily affirmed.

Appellant's second claim in this case, alleging an unconstitutional "bipartisan gerrymander" in the drawing of Ohio congressional district lines, is flawed as well. Appellants' requested remedy (for the court to order the Ohio General Assembly to devise a "fair process" devoid of any considerations such as protection of incumbents or maintaining a balance between political parties) ignores that "apportionment is a political process," *Karcher*, 462 U.S. at 739-40, and that Article I of the Constitution places the responsibility for drawing voting districts on the States in the first instance, *see Growe v. Emison*, 507 U.S. 25, 34 (1993).

This Court's decision in *Gaffney v. Cummings*, 412 U.S. 735 (1973), defeats Appellants' bipartisan gerrymandering claim. *Gaffney* held that a reapportionment plan that was designed to create safe seats for the major parties consistent with their existing relative voting strength in the state legislature, the desired effect being retention in office of as many incumbents as possible, was constitutional.

Appellants disavow reliance upon the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), to support their bipartisan gerrymandering claim, and that case does not support their claims in any event. Appellants cannot sufficiently allege either that the Ohio redistricting plan intentionally discriminated against an identifiable and cohesive political group, *see id.* at 127; *cf. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), or that the plan will consistently degrade a group of voters' influence on the political process as a whole (i.e., throughout the 1990's and after the redistricting after the 2000 census), *Bandemer*, 478 U.S. at 135-36.

Finally, Appellants' invocation of a generalized principle of "government neutrality"--based on an "amalgam of the Equal Protection Clause, the First, Fourteenth, and Fifteenth Amendments, and even the Magna Carta" (District Court Decision, Jur. St. at A-12)--to support their claims fares no better. Such a principle has not yet been recognized as a discrete constitutional right, and this Court should continue to exercise caution in doing so in this instance. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 121-22 (1991).

ARGUMENT

I. Ohio's Congressional Redistricting Plan Does Not Violate The "One Person, One Vote" Principle Of *Wesberry v. Sanders*, 376 U.S. 1 (1964).

A. Alleged Population Variations In Ohio's Congressional Districts Are Not A "Significant Variance Between Districts" Sufficient To Shift The Burden Of Proof To The State To Justify Any Alleged Discrepancy.

The issue presented by this appeal is straightforward: did the three-judge district court panel correctly conclude that the congressional redistricting of Ohio after the 1990 census was constitutionally sound? Appellants contend that Ohio's congressional districts violate Article I, §2 of the United States Constitution which provides in part that "The House of Representatives shall be composed of members chosen every second year by the people of several States...." That section also provides "Representatives ... shall be appointed among the several States ... according to their respective numbers...." In evaluating this question, the three-judge panel, citing *Karcher v. Daggett*, 462 U.S. 725 (1983),

recognized that there is a two part inquiry for evaluating the constitutionality of congressional districting:

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each *significant* variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31 (emphasis added by district court panel), District Court Decision, Jur. St. at A-8.

The most important fact relevant to this case, as alleged in Appellants' complaint below, is that a few of Ohio's congressional districts have a maximum deviation in actual numbers (not percentages) of +2 or -7 individuals. The district court panel properly held that "this minuscule deviation does not represent the 'significant variance between districts' that *Karcher* requires before the burden shifts to the state to justify the discrepancy." District Court Decision, Jur. St. at A-8. The court continued: "Thus, we hold that when, across nineteen congressional districts, the variation in size between the largest and smallest districts is just nine persons, there is no viable claim of a violation of Article I, §2" of the United States Constitution. *Id.*

In reaching this conclusion, the panel compared these population discrepancies with the population variances found in other congressional district plans which had been the subject of Supreme Court challenges. For example, in *Karcher*, where this Court found that New Jersey's plan for congressional districts was unconstitutional, the difference between the largest and smallest district was 3,674 individuals. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court evaluated a challenge to Georgia's congressional redistricts after the 1960 census and found them to violate Article I, §2 of the United States Constitution. The difference in *Wesberry* between the largest and smallest district was 551,526. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), where the Court determined that Missouri's plan to redistrict was invalid, the figure was 25,802. Viewed in this light, the maximum difference of nine presented by the facts of the instant suit is indeed "minuscule" and constitutionally insignificant. Jur. St. at A-8. On the basis of such a small population variation, and on the basis of the express language of *Karcher* which requires "significant" variance between districts to be constitutionally actionable, the panel correctly determined that the burden to justify such discrepancy did not shift to the state. Jur. St. at A-8 to A-9.

The district court's holding in this case correctly recognizes that unlike the situations presented in *Karcher*, *Wesberry* and *Kirkpatrick*, such a minuscule deviation from exact population equality itself demonstrates the State's good faith effort to draw districts of equal population. This is so even if a court (or a plaintiff) "can conceive of minor improvements." *See Karcher*, 462 U.S. at 739, n.10. A difference of +2 or -7 is so small that to eliminate it may well require that a household be divided. *Cf.* Jur. St. at 7, n.15. Such a difference also is so small as to be attributable entirely to computer or human error. At all events, this is a far cry from a case in which an entire political subdivision

could be moved from one district to another to lessen the population differences. *Cf. Karcher*, 462 U.S. at 739.

Appellants' reliance on *Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd mem.*, 504 U.S. 938 (1992), to support their claim is misplaced. Appellants assert that the district court in *Anne Arundel* reasoned that a variance of ten persons from the ideal district size must be justified by the State.[3] The holding of *Anne Arundel* that was necessary to the court's judgment is that the Maryland redistricting plan was constitutional because it was supported by legitimate goals within the ambit of *Karcher*--namely, among others, promoting the re-election of incumbents. *Anne Arundel*, 781 F. Supp. at 398.[4]

---

[3]*Karcher* did not hold that the existence of an alternative redistricting plan with a smaller numerical deviation from absolute equality was an indication of lack of good faith. *But cf. Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 396 (D. Md. 1991), *aff'd mem.*, 504 U.S. 938 (1992); *Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992). This Court in *Karcher* did not reach this question, given that entire political subdivisions between contiguous districts would have produced districts much closer to numerical equality. 462 U.S. at 739 ("[I]t was unnecessary for the District Court to rest its finding on the existence of alternative plans...").

[4]Additionally, this Court's summary affirmance of the judgment in *Anne Arundel* without a written opinion affords precedential effect to the judgment (*i.e.*, upholding the redistricting plan), but not necessarily the reasoning of the district court that was not essential to that judgment. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). For the same reason, the cases cited at note 83 of Appellants' Jurisdictional Statement--including cases which pre-

Ohio respectfully requests that the Court dismiss this appeal or affirm the lower court's decision on the basis of the district court panel's well-reasoned analysis with respect to the truly insignificant population variances in Ohio's congressional map.

B. Even If The Alleged Population Discrepancies Are Significant Enough To Shift The Burden To Ohio To Justify The Variations, The Allegations In Appellants' Complaint Provide Justifications Which This Court Has Recognized As Valid Reasons For Population Variations Among Districts.

In the event that this Court determines that even such infinitesimal population discrepancies require justification, Ohio submits that Appellants' complaint itself provides sufficient justification for them. This Court has determined that the standard for evaluating whether variations from strict equality are justified is a flexible one:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

---

date *Karcher*--are not controlling (or apposite) here.

Karcher, 462 U.S. at 741. Thus, because the deviations at issue in the instant case are so small, any burden that the State might have to provide justification for them should be correspondingly light.

The interests which this Court has found to be legitimate state objectives which may justify population variances among districts include avoiding contests between incumbents. *Karcher*, 462 U.S. at 741; *accord*, *White v. Weiser*, 412 U S. 783, 797 (1973); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966).[5] Additionally, maintaining balance between political parties is a legitimate goal which preserves the will of the people as expressed in prior elections under old district plans, again providing continuity of representation. *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991) (plan approved would have "politically fair distribution of congressional seats across party lines"); *Cf. Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) (state reapportionment). This Court has deferred to state legislative policies such as these even when those policies result in minor differences in the population of congressional districts, if the State's policy is otherwise consistent with constitutional mandates. *E.g.*, *White v. Weiser*, 412 U.S. at 795-797.

According to Appellants' complaint, when the Ohio General Assembly drew congressional districts following the 1990 census, it developed a redistricting plan which protected

---

[5]The district court in *Anne Arundel* also held that legitimate state goals "within the ambit" of *Karcher* and which may justify the variations in a state's districting plan include the reelection of incumbents. 781 F.Supp. at 398; *accord*, *Arizonans For Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans For Fair Representation*, 507 U.S. 981 (1993).

almost all of the incumbents and which attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats. *See, generally,* Complaint at ¶¶25, 26, and 31, Jur. St. at A-31 to A-35. Appellants' complaint, far from stating a cognizable claim, actually *provides* the justifications for the infinitesimal deviations among the districts.

Appellants argue that if the legislature had as its true goal the preservation of incumbents, it could have met that goal completely because there are exactly nineteen congressional seats and there were exactly nineteen incumbents. Appellants conclude that the legislature consciously decided to "sacrifice" two incumbents and that this demonstrates that it could not have had a genuine interest in the legitimate state goal of preserving incumbent seats. However, this also fails to state a cognizable claim.

The fact that the state's plan preserved some but not all incumbents neither detracts from nor invalidates the state's attempt to foster the legitimate goal of retaining incumbents under the new districting plan. As this Court recognized in *Karcher*, the degree of any justification that a state may be required to provide for a population deviation is roughly comparable to the degree of the deviation itself. *Karcher*, 462 U.S. at 741; *see, also, Anne Arundel*, 781 F. Supp. at 397. In this case, the maximum variation in Ohio's redistricting plan as alleged in the complaint is +2 or -7 -- or a deviation of 0.0016%. Given this tiny deviation, any justification that Ohio may be required to offer has been amply provided by the reasons alleged in Appellants' complaint. Without admitting or denying the truth of these allegations, and viewing them in the light most favorable to the Appellants, Ohio submits that Appellants' own complaint provides adequate and legitimate justification for the minuscule population deviations alleged in the complaint, and

that the district court's dismissal of this case therefore should be affirmed on this basis also.

C. Appellants Do Not Seek The Remedy Provided Under Existing Law For A Violation Of The "One Person, One Vote" Principle In Any Event, And For This Reason Also, The Dismissal Of Their Claims Should Be Affirmed.

While Appellants in their jurisdictional statement make about as much as can be made of the alleged +2 and -7 population variance in several of Ohio's nineteen Congressional districts, it is evident from their arguments, as in the court below, that they do not seek the only remedy that would be available under *Karcher v. Daggett*, *supra*, for such a variance. That Appellants are not seeking a plan with precise mathematical equality among districts is clear from their allegation that one of their favored plans will "meet Constitutional equality requirements by maintaining a variation in population less than plus or minus one percent from a perfectly equal population division," Appellants' Complaint at ¶27, Jur. St. at A-33--a standard that the current Ohio plan far exceeds. *See, also,* Transcript of Oral Argument Before District Court, at p. 30, Appendix to Appellees' Motion at A-3 (Appellants' counsel conceding that if someone drew a Congressional districting map by a process somehow entirely free of political considerations, and it turned out to be exactly the same as the current Ohio map, it would "absolutely" be acceptable to Appellants). *Cf. Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Appellants' complaint, in short, seeks a remedy that is more "unconstitutional" (at least according to the nature of their claim) then the state action they are challenging.

The remedy that Appellants seek is a court order that the Ohio General Assembly devise a "fair process" -- one devoid of any political considerations -- and that the federal courts thereafter engage in a "fairness" review of the results of that process (*i.e.*, presumably the electoral results). Because this remedy is not available under existing law, *see Mahan v. Howell*, 410 U.S. 315, 322 (1975) ("population alone has been the sole criterial of constitutionality in Congressional redistricting under Art. I, Section 2"); *see, also, Badham v. March Fong Eu*, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (Art. I, § 2 does not include limitations on the political characteristics of the voters who are grouped together), *accord, Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992), *aff'd mem.*, 506 U.S. 801 (1992), and indeed runs counter to this Court's decisions which recognize that legislative redistricting is best left to the state legislatures unless federal judicial interference is unavoidable, this case should be summarily affirmed.

II. Appellants' "Bipartisan Gerrymandering" Claim Is Without Legal Basis And Was Properly Rejected By The District Court.

A. The Remedy Appellants Seek Disregards This Court's Precedents Which Recognize That The States Have Primary Responsibility For Redistricting.

Appellants' second claim in this case (*see* Jur. St. at 13) relates to the manner by which the congressional map was drawn in Ohio rather than the resulting population variations among the congressional districts. What Appellants seek is an order requiring Ohio to devise an "impartial procedure" to establish Congressional districts in Ohio, and, implicitly, for the federal court thereafter to

review the results of the procedure to decide if it was in fact "fair." *See, generally,* Jur. St. at 20-21; Complaint, A-58, A-59; Appellants' Memorandum Contra to Appellees' Motion to Dismiss, A-109.

As the district court correctly observed, Jur. St. at A-10 to A-11, Appellants simply fail to acknowledge that many of the cases on which they rely expressly recognize that state legislatures have the "primary responsibility" for reapportionment. *See, e.g., White v. Weiser*, 412 U.S. 783, 799 (1973) (Marshall, J., concurring); *see, also, id.*, at 794-95, citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Voinovich v. Quilter*, 507 U.S. 147, 156 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place"); *see, also, Growe v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. Const., Art. I, §2) ("the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"). This is in keeping with this Court's pronouncement that "apportionment is a political process" during which the legislature may take into account several legitimate interests, including preservation of incumbents, as long as it does so "consistent with constitutional norms." *Karcher*, 462 U.S. at 739, 740. The district court correctly declined to adopt Appellants' novel proposition that Art. I, §2 of the Constitution ordains a purely ministerial role for State legislatures in the redistricting process. Jur. St. at A-11.

Appellants' plea that the districting process should be turned over to any and all groups with "an interest" in the process, whether that be the Libertarian Party or the computer class at the local university, *cf.* Appellants' Memorandum Contra to Appellees' Motion to Dismiss, Jur. St. at A-101, is as unworkable as it is unsupported in the Constitution. *See, generally, Gaffney v. Cummings*, 412

U.S. 735, 753 (1973); *Pope v. Blue*, 809 F. Supp. at 398 (court rejected plaintiffs' contention that the Constitution requires that a computer program create redistricting plans that comport with non-partisan districting criteria). Because Appellants seek relief that is both unprecedented and unworkable and have not alleged a cognizable constitutional violation, the district court correctly dismissed Appellants' case.

B. *Gaffney v. Cummings*, 412 U.S. 735 (1973), Defeats Appellants' "Bipartisan Political Gerrymandering" Claim.

Appellants assert that Ohio's congressional districts are the result of a "*bipartisan* collusive gerrymander and [are] unique in American jurisprudential history because of that fact." Appellants' Memorandum Contra to Appellees' Motion to Dismiss (emphasis in original), Jur. St. at A-98. It is no mystery why a (successful) bipartisan gerrymandering claim would be "unique in American jurisprudential history" -- it is foreclosed by controlling precedents of this Court, principally, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

Appellants strain to distinguish *Gaffney*, in which this Court expressly affirmed a legislative reapportionment plan that was designed to create safe seats for the major parties in the state legislature, the desired effect being the retention in office of as many incumbent legislators as possible. *Id.* at 752. Despite the acknowledged intentions of the drafters of the Connecticut plan at issue in *Gaffney*, this Court concluded that the plan was constitutional as a matter of law. Specifically, the Court found:

> [t]he record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House

> district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas....
>
> We are quite unconvinced that the reapportionment plan offered by the [defendants] violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary.

Id.

As this Court accurately observed in *Gaffney*, not only are "[p]olitics and political considerations ... inseparable from districting and apportionment, " *id.*. at 753, but "[d]istrict lines are rarely neutral phenomena." *Id.* Indeed, district lines "can well determine what district will be predominantly Democratic or ... Republican ... [o]r may pit incumbents against one another or make very difficult the election of the most experienced legislator." *Id.* The "reality," this Court opined, "is that districting inevitably has and is intended to have substantial political consequences." *Id.* Thus, courts should not interfere with "essentially political processes" that reflect a State's successful efforts to "allocate political power to the [major] parties in accordance with their voting strength." 412 U.S. at 754.

The similarities between the facts in *Gaffney* and the allegations in the complaint in this case are not only striking but clearly reinforce the District Court's decision to dismiss Appellants' political gerrymandering claim. Appellants' complaint alleges that the Ohio Democratic and Republican Parties, the only parties with sufficient voting strength to elect legislators, *cf. Gaffney*, 412 U.S. at 752, promulgated a redistricting plan designed to achieve relative proportionality between incumbents of both parties in the districting of Ohio's delegation to Congress.

The fact that this case involves congressional redistricting does not serve to distinguish *Gaffney*. This Court has observed in the congressional redistricting context that avoiding contests between incumbents is among the legitimate factors that a state legislature may take into account in redistricting. *See Karcher v. Daggett*, 462 U.S. at 740; *accord*, *White v. Weiser*, 412 U.S. at 797. *See, also, Bush v. Vera*, __ U.S. __, 116 S.Ct. 1941, 135 L.Ed.2d 248, 260-61 (1996) (citing *Gaffney* in reaffirming that incumbency protection is recognized as a legitimate state goal in congressional redistricting).

C. Appellants Eschew Reliance Upon *Davis v. Bandemer*, 478 U.S. 109 (1986), And That Case Lends No Support To Their Claims In Any Event.

Appellants expressly disavow reliance upon *Davis v. Bandemer*, 478 U.S. 109 (1986), in this case. *See* Jur. St. at 19, n.58 ("This case is not a *Bandemer* case ..."). This concession, in addition to the controlling precedent discussed elsewhere in this motion, forecloses Appellants' claims.

Appellants understandably admit that *Bandemer* does not support their claims. The plurality opinion[6] in *Davis v. Bandemer* announced the test for deciding whether an alleged partisan political gerrymander (*i.e.*, a gerrymander designed to benefit only one of the major parties) violates the Constitution. Parties asserting such a claim must allege and prove "both intentional discrimination against an *identifiable political group* and an actual discriminatory effect on that group." 478 U.S. at 127 (emphasis added). In the case at bar, Appellants' complaint fails to satisfy either prong of the test because it does not identify a political group that has been discriminated against, intentionally or otherwise, nor does it allege sufficient facts to support a finding of discriminatory effect.

1. The Complaint Fails To Allege Intentional Discrimination Against Identified Groups Of Which Appellants Are Members.

Appellants allege in their complaint that Ohio's plan discriminates against certain candidates from the two major parties, independent voters (unidentified except for Plaintiff Kukor), and members of the Libertarian Party. It should go without saying that a bipartisan gerrymander crafted by the Democratic and Republican Parties cannot be designed to discriminate against those parties. Indeed, the author of the *Bandemer* plurality opinion observed (at an earlier point in that decision) that "... nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation ...", 478 U.S. at 125, n.9 (opinion of White,

---

[6]When the Supreme Court does not speak through a majority of its members, the plurality opinion providing the "narrowest grounds" for the decision is controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977).

J.). Thus, Appellants Miller, Erney, Fitrakis, Hollister, Pansino, Woodall, and Grote (all either Republicans or Democrats) cannot allege the type of harm contemplated by the *Bandemer* plurality. *Cf.* 478 U.S. at 131 (noting that *Gaffney* upheld a similar "political fairness" approach).[7] Indeed, by virtue of their respective affiliations with opposing parties, Appellants Miller, Pansino, Woodall, and Grote on one hand, and Erney, Fitrakis, and Hollister, on the other, cannot seriously claim that they have a common political interest that unites them. That they have joined together to prosecute a single lawsuit does not satisfy the constitutional requirements of group status required by *Bandemer*.

Just as individual candidates from the major political parties cannot successfully challenge the constitutionality of a bipartisan districting plan, it should be equally obvious that independent voters (such as Appellant Kukor), are not an identifiable and cohesive group for purposes of vote dilution analysis. Indeed, it would be impossible to devise a districting plan that intentionally discriminated against "independent voters" as a group--voters who by definition are *not affiliated* with a particular political party.

Finally, the allegation that district lines were drawn out of compromise between the Democratic and Republican

---

[7]While it is true as a general matter that individual candidates for either party, even incumbents such as Miller, may encounter difficult odds in a particular district under a particular districting plan, they cannot make out a claim for bias against them as an identifiable group, which is the essence of a vote dilution claim under the Constitution. *See Bandemer*, 478 U.S. at 127; *cf. Gaffney*, 412 U.S. at 753 ("Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislation.").

Parties is insufficient to establish that the lines were drawn to intentionally discriminate *against* the Libertarian Party (or indeed, against any of the other Appellants), a requirement of a political gerrymandering claim under *Bandemer*. 478 U.S. at 127. Intentional discrimination "implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted). Except in very conclusory terms, nothing in the complaint supports any of Appellants' claims that Ohio's districting plan was drawn with any specific purpose other than to achieve compromise between the major political parties.

2. Appellants' Complaint Fails To Allege The Requisite Discriminatory Effect Demanded By *Bandemer*.

Even if Appellants could somehow have alleged sufficient discriminatory intent (which they did not), the allegations of their complaint cannot establish "discriminatory effect" as defined by this Court. As the Court noted in *Bandemer*, unconstitutional discriminatory effect "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." 478 U.S. at 132. There is no constitutional requirement in this context that "... any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat...." *Bandemer*, 478 U.S. at 136 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971)).

First, Appellants' reliance on the results of a single (1992) election to prove unconstitutional discrimination in the

context of political gerrymandering "is unsatisfactory" under *Bandemer*. *Id.* at 135-36 (in order to demonstrate unconstitutional partisan gerrymandering, Democrats in Indiana had to prove that the "1981 reapportionment would consign ... [them] to a minority status ... throughout the 1980's or that ... [they] would have no hope of doing any better in the reapportionment that would occur after the 1990 census"). The allegation that Appellant Miller lost in the 1992 Republican primary by a "razor-thin margin," complaint at ¶41, Jur. St. at A-37, falls far short of alleging that Miller would have no hope of political success throughout the 1990's or beyond. *Cf.* District Court Decision, Jur. St. at A-11. Appellants' complaint simply is devoid of factual allegations sufficient to satisfy this threshold requirement in *Bandemer*.

Second, the individual candidate Appellants and Appellant Kukor (an independent voter), because they do not comprise a group, cannot demonstrate any discriminatory impact on them as a group, let alone the degree of discriminatory effect required to make out a claim under the Equal Protection Clause of the Constitution. Additionally, state-wide district lines have limited impact on independent voters because the candidates for whom independents vote, at least from time to time, will experience electoral success.

Third, the complaint does not sufficiently allege any discriminatory effect on the Libertarian Party, which is not a state-recognized political party. Complaint at ¶6, Jur. St. at A-25. *Cf.* note 2, *supra*, and O.R.C. §3517.01(A). The Libertarian Party is not a "recognized political party" under Ohio law because it has not mustered even the modest statutory amount of support among the state's voters necessary for recognition. It follows that no matter how district lines are drawn, it is likely that the electability of Libertarian Party candidates will not be enhanced sufficiently

to change the effect, discriminatory or otherwise, that the current district lines may have on the Libertarian Party (even assuming the small number of Ohioans who comprise the Libertarian Party reside in proximity to each other, which the complaint does not allege).

Because Appellants disavowed any claim under *Bandemer*, and because their complaint failed to state such a claim in any event, the district court's judgment dismissing this case should be affirmed.

III. There Is No General Constitutional Principle Of "Governmental Neutrality" That Would Create The Right Urged By Appellants.

Appellants' principal argument in support of their claims is that Ohio's congressional districts violate some amorphous constitutional principle of "governmental neutrality" which they have constructed from an "amalgam of the Equal Protection Clause, the First, Fourteenth, and Fifteenth Amendments, and even the Magna Carta." District Court Decision, Jur. St. at A-12.[8] The district court's analysis of this contention is sufficient to put that claim to rest: "[w]hile we acknowledge that the 'concept of government as neutral referee' has been articulated in the context of specific constitutional claims, it has not yet been recognized as a discrete constitutional right." Jur. St. at A-

---

[8]Appellants in this Court do not press their purported First Amendment claims asserted below, perhaps because courts to date have rejected such claims in this context. *See, e.g., Anne Arundel County Republican Central Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. at 401; *Pope v. Blue*, 809 F. Supp. at 398-99; *Badham v. March Fong Eu*, 694 F. Supp. at 675; *Holloway v. Hechler*, 817 F. Supp. 617, 629 (S.D. W.Va. 1992), *aff'd mem.*, 507 U.S. 956 (1993).

12. This Court has exercised restraint in the creation of new constitutional rights, *e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 121-22 (1991) (citing *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)), and should continue to do so in this instance in which the right which Appellants ask this court to acknowledge is completely without foundation or precedent and totally without boundary or contour. While the government must be neutral in certain well-defined areas, beyond that, the government may, and does, promote certain policies while it disfavors others, as directed by the people who have elected its members. *See Gaffney*, 412 U.S. at 752-54; *Karcher*, 462 U.S. at 741; *White v. Weiser*, 412 U.S. at 797.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below, dismissing Appellants' action with prejudice, should be affirmed.

Respectfully submitted,

BETTY D. MONTGOMERY
Ohio Attorney General

DIANE R. RICHARDS
Counsel of Record
Section Chief, Chief Counsel's Staff

CATHERINE P. PALAZZOLO
Assistant Attorney General

JEFFREY S. SUTTON
State Solicitor

30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-2872/(614) 728-7592 [fax]
Counsel for Appellees

October 25, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - -

CLARENCE E. MILLER, ET AL. :

PLAINTIFFS, :

V. : CASE NO. C-2-94-1116

STATE OF OHIO, ET AL. :

DEFENDANTS. :

- - -

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ALAN E. NORRIS, THE HONORABLE GEORGE C. SMITH, THE HONORABLE WALTER H. RICE, UNITED STATES DISTRICT COURT, SITTING AT COLUMBUS, OHIO, ON TUESDAY, AUGUST 29, 1995.

- - -

APPEARANCES:

MR. DAVID V. STIVISON,
ON BEHALF OF THE PLAINTIFFS.

MS. DIANE R. RICHARDS AND MS. SUSAN E. ASHBROOK,
ON BEHALF OF THE GOVERNMENT DEFENDANTS.

- - -

Tuesday Afternoon Session,
August 29, 1995

- - -

JUDGE NORRIS: This is case number C-2-94-1116. This is a three-Judge Court convened pursuant to 28 USC Section 2284(b)(1), and we are here this afternoon to hear arguments on the defendant's motion to dismiss filed pursuant to Civil Rule of Procedure 12(b)(6). At this point, I would ask counsel for the plaintiffs to -- for the plaintiffs to enter an appearance on the record.

MR. STIVISON: Thank you, Your Honor.

My name is David Stivison, S-T-I-V-I-S-O-N, appearing today on behalf of the plaintiffs, all of them in this action.

JUDGE NORRIS: Thank you. And for the defendant?

MS. RICHARDS: Your Honor, my name is Diane Richards, arguing today on behalf of the defendants in this case. Also seated with me at counsel table is Susan Ashbrook, an Assistant Attorney General.

JUDGE NORRIS: Thank you. With that then, those entries, anything further that we need to enter on the record?

We will call on Ms. Richards to begin her argument, and again, how much time for rebuttal?

* * *

JUDGE NORRIS: Let's assume the man from Mars lands, and the legislature says: Draw me 19 districts. And the man from Mars doesn't know anything about the background of politics and parties. He just draws the map, and it turns out to be exactly the map that we have before us. It is just pure coincidence. That's okay now, right?

MR. STIVISON: Absolutely.

JUDGE NORRIS: So, it is motive that counts?

MR. STIVISON: Well, people like Clarence Miller or Steven Grody or other of the plaintiffs here would know that whatever fight they face, they face because that's the way the cards fell. It was not a matter -- they weren't picked. Someone picked Congressman Miller for elimination. I think under Karcher v. Daggett, we have a right to put a witness on the stand and say: How did you do that? If this is the consistent application of an important State principle, tell us how that is. Explain to us how the application of the principles that you have identified lead to a variance of minus seven --

JUDGE NORRIS: Your argument on incumbents --

MR. STIVISON: On what?

JUDGE NORRIS: On incumbents, it intrigues me just a little bit. It is kind of like an ownership idea. You even allege a 1983 action on behalf of Congressman Miller, which to me -- is it a property concept? Congressmen own their districts, and you can't deprive them of them; is that it?

Why is Congressman Miller -- how does he have any kind of standing to complain that people drew the lines, if they followed other concepts? What possessory right does he have to the district? I don't get it.

MR. STIVISON: He doesn't have a possessory right to a district, and if these district lines were drawn -- I'm sorry.

JUDGE NORRIS: Don't you allege that?

MR. STIVISON: No, sir. No, sir. If these lines were drawn according to a consistently applied standard that reflects a valid State interest -- which is a question of fact that we have to prove at trial, we can't do it here. Then -- then, so be it.

JUDGE NORRIS: Right.

MR. STIVISON: We don't believe it is. The people who drew the lines made it very clear what they were doing.

JUDGE NORRIS: I mean, I understand your argument. As Judge Rice mentioned, voters, you know, have some interest in how these lines are drawn. But congressmen? I just -- but I know they like to talk about my district and your district, but now --

- - -

CERTIFICATE

- - -

I, Georgina L. Wells, Registered Professional Reporter, Official Court Reporter, Holder of Certificate of Merit do hereby certify that the foregoing 51 pages constitutes a true, correct and complete transcription of the oral argument in the above-entitled cause heard before The Honorable Alan E. Norris, The Honorable George C. Smith and The Honorable Walter H. Rice, United States District Court, sitting at Columbus, Ohio, on Tuesday Afternoon, August 29, 1995, and said proceedings having been written by me, electronically reproduced and transcribed by computerization and personally edited by me against my computerized stenographic notes.

_____

GEORGINA L. WELLS, RPR, CM
Official Court Reporter

- - -

O.R.C. §3501.01 Definitions.

As used in the sections of the Revised Code relating to elections and political communications:

* * *

(F) "Political party" means any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the information and existence of a political party.

* * *

O.R.C. §3517.01 Definitions.

(A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing. No such group of electors shall assume a name or designation that is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

* * *

Supreme Court, U.S.
FILED
NOV 4 1996
CLERK

No. 96-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CLARENCE E. MILLER, *et al.*,

Appellants,

v.

STATE OF OHIO, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR TO AFFIRM

DAVID V. STIVISON
Counsel of Record
870 North 30th Street
Philadelphia, PA 19130
(215) 763-2809

Counsel for Appellants

Of Counsel:

JOHN B. ANDERSON
Distinguished Visiting
Professor of Law
Nova Southeastern University
Shepard Broad Law Center
3305 Collage Avenue
Fort Lauderdale, FL 33314
(305) 452-6100

JOHN R. GREIBER, JR.
COUNCIL, BARADEL, KOSMER &
NOLAN, P.A.
125 West Street, Forth Floor
P.O. Box 2289
Annapolis, MD 21404-2289
(401) 268-6600

14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE TO APPELLEES' MOTION 1

THE PRINCIPLE OF GOVERNMENTAL NEUTRALITY 1

DIRECT ELECTION OF REPRESENTATIVES 2

ONE PERSON, ONE VOTE 6

TABLE OF AUTHORITIES

Cases

Boddie v. Connecticut, 401 U.S. 371 (1971) 1

Davis v. Bandemer, 478 U.S. 109 (1986) 4, 8

Gaffney v. Cummings, 412 U.S. 735 (1973) 2, 3, 4, 5

Karcher v. Daggett, 462 U.S. 725 (1983) 7, 8, 9

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 8, 9

Mahan v. Howell, 410 U.S. 315 (1973) 3

Newman v. Voinovich, 789 F.Supp. 1410 (S.D.Ohio 1992), aff'd. 986 F.2d 159 (6th Cir. 1993) 9

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 1

Reynolds v. Sims, 377 U.S. 533 (1964) 8

Romer v. Evans, ____ U.S. ____, 116 S.Ct. 1620 (1996) 1

Shaw v. Reno, ____ U.S. ____, 113 S.Ct. 2816 (1993) 8

Stone v. Hechler, 782 F.Supp. 1116 (N.D.W.Va. 1992) 10

U. S. Term Limits v. Thornton, ____ U.S. ____, 115 S.Ct. 1842 (1995) 6

Wells v. Rockefeller, 394 U.S. 542 (1969) 8

Wesberry v. Sanders, 376 U.S. 1 (1964) 7, 9

Federal Constitution and Statutes

U. S. Const., Article I, Section 2 6, 8

U. S. Const., Article I, Section 9 1

Federal Rules of Civil Procedure

F. R. Civ. P. 12(b)(6) 9

RESPONSE TO APPELLEES' MOTION

THE PRINCIPLE OF GOVERNMENTAL NEUTRALITY

As the lower Court recognized and as appellants demonstrated, the principle that "the State must govern impartially"[1] has been applied to free speech, freedom of association and freedom of religion. This principle governs equal access to the Courts[2] and to the voting booth. Preventing the government from targeting individuals for invidious treatment is the basis for our Constitutional prohibition of bills of attainder and ex post facto laws[3]. This principle has also been applied in a variety of cases involving the electoral process[4]. Congressman Miller and the other appellants here ask this Honorable Court to now apply this well-established principle to the drawing of Congressional district boundaries. The lower Court's characterization - that the concept of government as neutral referee "has not yet been recognized as a discrete constitutional right"[5] as applied to district boundaries - cries out for such a consideration.

The State simply does not address the validity of judging this case against the principle of governmental neutrality or

---

[1] *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979), quoted at Jur. St. 8.

[2] *E.g., Boddie v. Connecticut*, 401 U.S. 371 (1971).

[3] U. S. Constitution, Article I, Section 9.

[4] Jur. St. 10-11, most recently in *Romer v. Evans*, ____ U.S. ____, 116 S.Ct. 1620 (1996).

[5] Jur. St. at A-12 (emphasis added).

impartiality. It merely urges the Court to exercise "restraint in the creation of new constitutional rights."[6]. But this is not a new right. It is the application to a new question of a well-established and well-recognized principle of governmental evenhandedness.

The Jurisdictional Statement at pp. 8-12 show that this right is not "completely without foundation or precedent."[7] To the contrary, it fulfills and extends rights long established by this Honorable Court. Nor is the right sought "totally without boundary or contour."[8] The right is simply the right to receive evenhanded treatment from state legislatures engaged in drawing boundaries for federal office, namely, membership in the United States House of Representatives.

DIRECT ELECTION OF REPRESENTATIVES

The State has one note and one note only to play in response to the appellants' argument based on Article I, Section 2 and 4 and the First and Fourteenth Amendment of the Constitution: *Gaffney*[9] gives us the right to gerrymander.

Using the debates of the Constitutional Convention, appellants have shown that "The Framers did their best to insulate Congressional elections from state legislative

---

[6] Appellees' Motion to Dismiss or to Affirm ("Motion"), at 25.

[7] Motion, p. 25.

[8] Motion, p. 25

[9] *Gaffney v. Cummings*, 412 U.S. 735 (1973), discussed at Motion, 17-19 and also cited at 6, 12, 16, 21 and 25.

machinations."[10] According to the State, original intent means nothing in the face of *Gaffney*. Yet *Gaffney* has no bearing on this case, for a number of reasons:

1. It involved a state legislative reapportionment. The role of the federal courts in reviewing a state's establishment of its own state legislative boundaries is necessarily limited and is entirely different from its role in reviewing a state's Congressional line drawing, which involves a purely federal office. The dichotomy between these two roles has been consistently maintained[11]. *Gaffney's* majority opinion, by Justice White, specifically adopted the Court's conclusions in *Mahan v. Howell*[12] :

> We concluded that there are fundamental differences between congressional districting under Art. I and the Wesberry line of cases on the one hand, and, on the other, state legislative apportionments governed by the Fourteenth Amendment and Reynolds v. Sims [citation omitted] and its progeny.[13]

2. *Gaffney* involved a claim of partisan bias: "The Complaint

---

[10] Jur. St. 13-18, quotation from 18.

[11] *Mahan v. Howell*, 410 U.S. 315, 322, quoted in *Gaffney*, 412 U.S. at 742.

[12] 410 U.S. 315 (1973).

[13] *Gaffney v. Cummings*, 412 U.S. 735, 741-742 (emphasis added), discussed at Jur. St. A-98 - A-99.

further alleged the plan amounted to a political gerrymander and contained 'a built-in bias in favor of the Republican Party."[14] J. Brian Gaffney, Chairman of the State Republican Party, intervened to defend the plan against this charge[15]. If *Gaffney* had been filed today, it may well have been judged by the criteria established in *Davis v. Bandemer*[16] for evaluating partisan gerrymanders in state legislatures[17].

3. The *Gaffney* plaintiffs alleged group rights to political representation while the *Miller* plaintiffs assert individual rights. Clarence Miller the individual was harmed when his district was shattered and he went down to the defeat which had been planned for him. The fact that he lost by a "razor-thin margin"[18] is a red herring: He lost. He is asserting here his individual right to participate in an impartial, nondiscriminatory election process. Plaintiff Thomas Erney, a Democrat, was individually harmed when the 1992 Ohio redistricting increased the Republican majority in Congressional District 15, for the purpose of deterring him or other challengers from opposing

---

[14] 412 U.S. at 739 (emphasis added).

[15] Id.

[16] 478 U.S. 109 (1986).

[17] The State spent fully one-fifth of its Motion setting up the straw man of *Bandemer* only to knock it down again (Motion, pp. 19-24). As appellants have repeatedly stated, that case is inapposite because it confronted only a partisan [not bi-partisan] attack on a state [not federal] redistricting based on group [not individual] rights. (Jur. St. 19, f.n. 58: *Bandemer's* limited purpose is to prevent any single party from becoming so deeply entrenched that there is no reasonable hope of challenging the party machine.)

[18] See Motion, 23; Complaint, Jur. St. A-37; Order below, Jur. St., A-11.

incumbent Representative Wylie[19]. Each of the other individual plaintiffs has raised violations of his or her rights as individuals in this case. The Libertarian Party asserts the rights of those individual "members, candidates and potential candidates for Congress representing the Libertarian Party and other minor parties similarly situated"[20].

Finally, *Gaffney* was decided at a time when the Court believed that extirpating politics, that is to say, discretion, from redistricting decisions was impossible[21]. That is no longer true. Because of the vastly improved detail with which Census results are now reported, the advances in computers and programming and the development of impartial procedures for district line drawing by several experts in the field, the ancient evil of gerrymandering can today be cured, by adopting impartial districting procedures that remove discretion and, with it, the opportunity to engage in discriminatory districting (gerrymandering).[22] The original intent of the Framers can now be realized, for perhaps the first time.

---

[19] Complaint, Jur. St. at A-39.

[20] Complaint, Jur. St., A-49 - A-50 (emphasis added).

[21] *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

[22] Appellees state that appellants seek the adoption of a fair process devoid of any political considerations (which is true) but they then further state that appellants ask that "the federal courts thereafter engage in a "fairness" review of the results of that process (*i.e.*, presumably the electoral results)". Motion, 15. That is not true. Once the state's adopted procedure for drawing district lines is determined to be impartial and not subject to discretionary gerrymandering, the Court's review has ended. The electoral results need not be reviewed.

Former Congressman Miller and the other appellants rely on the interpretation of Article I Section 2 announced in *U. S. Term Limits v. Thornton*[23], a decision completely ignored by the State in its Motion. *Thornton* reaffirmed "the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[24] This Court then declared,

> [T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.[25]

Appellants argue that that Clause not only forbids favoring or disfavoring a class of candidates, but even more so the favoring or disfavoring of specific individual candidates, as they all allege was done by Ohio in 1992.

ONE PERSON, ONE VOTE

The State offers three reasons why *Wesberry v.*

---

[23] 115 S.Ct. 1842 (1995).

[24] 115 S.Ct. at 1851, quoting from *Powell v. McCormack*, 395 U.S. 486 (1969).

[25] Id., at 1869. This is true whether holding an election for federal office under Article I, Section 2 is a delegation of power to the state (Id., at 1855-56 [majority opinion]) or the imposition of a duty (Id., at 1883 [dissent of Thomas, J., joined by The Chief Justice, O'Connor, J., and Scalia, J.]).

Sanders[26] and its progeny do not require a trial in this instance. All three are wrong.

The third reason[27] was that "Appellants do not seek the only remedy that would be available under *Karcher*... - a plan with precise mathematical equality."[28] That claim misreads *Karcher*. The State correctly recognizes that appellants have no interest in replacing a nearly equi-populous gerrymander with an exactly equi-populous one. *Karcher*, however, does not require that result but rather speaks of "consistently applied legislative policies [that] might justify some variance, ..." "As long as the criteria are nondiscriminatory, ..."[29]

What, exactly, is a "consistently applied nondiscriminatory policy"? Appellants argue that it certainly is not a policy that discriminates against Congressional challengers but in favor of incumbents, nor a policy that discriminates against incumbent Clarence Miller but in favor of other incumbents. Rather, it is a policy, enacted into law, that *optimizes* the "traditional" and "objective" districting criteria of contiguity, compactness and non-fragmentation of local governmental units and balances them with population equality

---

[26] 376 U.S. 1 (1964).

[27] Motion, Section I.C., at 14-15.

[28] Motion, 5 (emphasis added). See also Motion, 14.

[29] *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

to achieve an impartial districting procedure[30].

Appellants' counsel correctly commented that if district "lines were drawn according to a consistently applied standard that reflects a valid State interest", and those lines - whether generated by a computer or a "man from Mars" - produced exactly the same map that the 1992 redistricting produced, that map would have no Constitutional infirmity[31].

The State also argued that the "minuscule" differences in population among districts do not violate *Karcher*[32]. This has already been addressed in Jur. St. 23-28. The State does not explain how its position could be reconciled with *Karcher*'s own words, "that there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, [Section] 2, without justification."[33] Nor is the State's position consistent with *Kirkpatrick v. Preisler's*

---

[30] See characterization of these criteria in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 2827 (1993). They are called "neutral and legitimate criteria" by which "district lines should be determined" in *Davis v. Bandemer*, 478 U.S. 109, 166 (1986), Powell, J., dissenting. The *Reynolds* court had said "A state may legitimately maintain the integrity of ... political subdivisions ... and provide for compact districts." 377 U.S. 533, 578 (1964). Justice White spoke of the virtues of compactness , *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969), White, J., dissenting. In defining gerrymandering as the "distortion of district boundaries" Justice Fortas implies that *non*-distorted (*i.e.*, compact) boundaries were a legitimate criterion for districting. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969), Fortas, J., concurring.

[31] Motion, 14, A-3.

[32] Motion, 5, Section I.A. at 7-11.

[33] *Karcher v. Daggett* at 734, quoted in Order, Jur. St. A-7 - A-8, and at Jur. St. 25.

requirement that "the State must justify each variance, no matter how small."[34] Appellants' position has consistently been that the Equal Protection Clause as interpreted in *Wesberry*, *Kirkpatrick* and *Karcher* requires a trial to test the State's reasons for adopting these variations. The State's Motion fails to even mention one crucial fact: The State legislature had before it four plans with exactly equal population, but chose to reject all four. Despite the State's concern, eliminating all variances did not require any households be divided[35]. Equi-populous districting was practicable and the State must explain why it was not done.

The State's second argument is the weakest: Even if justification is needed, plaintiff's Complaint supplies it[36]. In deciding a Rule 12(b)(6) Motion, all facts alleged in the Complaint are construed in the light most favorable to plaintiffs[37]. The State wishes to turn this on its head to construe all facts in the Complaint in the light most unfavorable to plaintiffs and favorable to the State. This effort must fail. Merely admitting that the State only tried to return some but not all[38] incumbent Representatives destroys the argument that

---

[34] *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969), discussed at Jur. St. 24-25.

[35] Motion, 9.

[36] Motion, Section I.B., at 11-14.

[37] *Newman v. Voinovich*, 789 F.Supp. 1410, 1415 (S.D.Ohio 1992), aff'd. 986 F.2d 159 (6th Cir. 1993).

[38] Motion, 12-13: State "protected almost all of the incumbents"; "preserved some but not all incumbents". How and why was that done and by whom requires a trial to establish.

"incumbent protection" was the consistently applied state interest justifying the variations. The State engineered two primary battles between pairs of incumbents, destroying the argument that "preventing incumbent contests" was the consistently applied legitimate state interest justifying the variances. How the State "attempted to maintain the balance in the Ohio congressional delegation between Republicans and Democrats,"[39] if it did, requires a trial to test whether that was a consistently applied legitimate state interest. Even if the asserted interests were legitimate, a trial is needed to see if any of the four rejected equi-populous plans would have substantially vindicated them[40]. Thus a trial is required even if the State's asserted interests were Constitutionally legitimate, which appellants deny.

For each of the above reasons and for all of them, appellants urge this Honorable Court to deny the State's Motion to Dismiss or to Affirm, reverse the lower Court's Order and remand this case for trial.

Respectfully submitted,

David V. Stivison

---

[39] Motion, 13.

[40] "This Court must also consider whether any other plans with lesser population variances are available that would substantially vindicate the State's interests." *Stone v. Hechler*, 782 F.Supp. 1116, 1126 (N.D.W.Va. 1992),